CERTIFICATE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted] 28

WESTERN FUEL COMPANY

vs.

ANTONE GARCIA, AS ADMINISTRATOR OF THE ESTATE OF MANUEL SOUZA, DECEASED.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED JANUARY 26, 1920.

(27,444)

(27,444)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 689.

WESTERN FUEL COMPANY

vs.

ANTONE GARCIA, AS ADMINISTRATOR OF THE ESTATE OF MANUEL SOUZA, DECEASED.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 7, 1920.

1 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3195.

WESTERN FUEL COMPANY (a Corporation), Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of Manuel Souza, Deceased, Appellee.

Upon Appeal from the United States District Court, Northern District of California, Southern Division.

Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, Certifying Certain Questions or Propositions of Law to the Supreme Court of the United States under Section 239, Judicial Code.

Before Gilbert, Ross, and Hunt, Circuit Judges.

This cause came to the Circuit Court of Appeals for the Ninth Circuit upon an appeal from the United States District Court
2 for the Northern District of California, Southern Division, from a judgment in favor of the appellee, as libelant in that court, against the appellant, as libelee in that court, for the sum of $10,000. The cause was a libel in admiralty for damages for wrongful death.

Manuel Souza, a citizen and resident of California, was killed while in the employment of Western Fuel Company, a corporation of California, working in the hold of the Steamship "Tanered," which was unloading at the bunkers of Western Fuel Company, in Oakland, California. This occurred on August 5, 1916. The deceased employee left him surviving a widow and five minor children.

On August 24, 1916, the widow of Manuel Souza made an application for adjustment of a claim presented by her against the Western Fuel Company to the Industrial Accident Commission of the State of California under the Workmens' Compensation Insurance and Safety Act of California, (Chapter 176, Laws of 1913, Stats. 1913, page 279). The State Industrial Accident Commission made an award favorable to the widow. The matter was taken to the Supreme Court of California for review, and on August 6, 1917, the award made by the State Industrial Accident Commission was annulled as having been made without jurisdiction, in view of the decision of the Supreme Court of the United States in the case of Southern Pacific Company vs. Marie Jensen, 244 U. S. 205.

Thereafter, to wit, on August 21, 1917, this cause was initiated by the filing of a libel for damages for wrongful death in the District

Court of the United States for the Northern District of California, Southern Division.

In this cause the appellee relies upon the provisions of the
3 statutes of the State of California giving a right of action for wrongful death and modifying in very substantial particulars the common law defenses of assumption of risk, negligence of a fellow servant and contributory negligence in cases where the relationship of employer and employee is involved. (Section 377, Code of Civil Procedure and Section 1970 of the Civil Code of California.)

The District Court, rendering its decree, applied the law as expressed in the California Code provisions above cited, having reference also to a state statute known as the "Roseberry Act" of 1911. (Chapter 399 of the laws of 1911; stats. 1911, page 796), Section 1 of which abolishes the doctrine of assumption of risk and the defense of negligence of a fellow servant, and found, to which this Court agrees, that the death of Souza was caused by the negligence of a fellow servant and held that the Roseberry Act of 1911 warrants recovery by the appellee herein because it does away with the doctrine of assumption of risk and the defense that the accident was caused by the negligence of a fellow servant.

Questions of law concerning which the Circuit Court of Appeals of the Ninth Circuit desires the instruction of the Supreme Court are:

1. Are the statutes of the State of California, conferring the right of action for wrongful death, to be applied in libels in admiralty for wrongful death?

2. If the state statutes do apply, are they to be applied with all their incidents abolishing or modifying the common law defenses of assumption of risk, contributory negligence and the negligence of a fellow servant, or

3. Does the state statute merely give the right of action and
, leave for application the rules of maritime law covering per-
4 sonal injuries, thus doing away with any distinction heretofore recognized between actions for personal injuries not resulting in death and actions for wrongful death sanctioned by state statutes.

(Signed) WM. B. GILBERT,
(Signed) ERSKINE M. ROSS,
(Signed) WM. H. HUNT,
Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated San Francisco, Cal., October 30th, 1919.

(Endorsed:) No. 3195. U. S. Circuit Court of Appeals for the Ninth Circuit. Western Fuel Company, a Corporation, Appellant, vs. Antone Garcia, as Administrator of the estate of Manuel Souza, deceased, Appellee. Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, certifying certain questions or propositions of law to the Supreme Court of the United States under

COPY BOUND CL

section 239, Judicial Code. Filed Oct. 30, 1919. F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk.

5 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3195.

WESTERN FUEL COMPANY, a Corporation, Appellant,
vs.
ANTONE GARCIA, as Administrator of the Estate of Manuel Souza, Deceased, Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals for the Ninth Circuit to Copy of Certificate of said Court Certifying Certain Questions or Propositions of Law to the Supreme Court of the United States.

I, Frank D. Monckton, as clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing four (4) pages, numbered from and including 1 to and including 4, to be a full, true and correct copy of the Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, Certifying Certain Questions of Propositions of Law to the Supreme Court of the United States Under Section 239 of the Judicial Code, filed in the above-entitled cause on the thirtieth day of October, A. D. 1919, as the original thereof remains on file and appears of record in my office.

Attest my hand and the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this thirtieth day of October, A. D. 1919.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk.
By PAUL P. O'BRIEN,
Detputy Clerk.

[Endorsed:] No. 3195. United States Circuit Court of Appeals for the Ninth Circuit. Western Fuel Company, a Corporation, Appellant, vs. Antone Garcia, as administrator of the estate of Manuel Souza, deceased, appellee. Certified copy certificate of United States Circuit Court of Appeals for the Ninth Circuit, certifying certain questions or propositions of law to the Supreme Court of the United States under section 239, Judicial Code.

Endorsed on cover: File No. 27,444. U. S. Circuit Court of Appeals, 9th Circuit. Term No. 689. Western Fuel Company vs. Antone Garcia, as administrator of the estate of Manuel Souza, deceased. (Certificate.) Filed January 26th, 1920. File No. 27,444. File No. 27,444.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 28.

WESTERN FUEL COMPANY, PETITIONER,

vs.

ANTONE GARCIA, AS ADMINISTRATOR OF THE ESTATE OF MANUEL SOUZA, DECEASED.

ON A CERTIFICATE FROM AND WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

CERTIFICATE FILED JANUARY 26, 1920.

CERTIORARI AND RETURN FILED APRIL 28, 1921.

(27,444)

(27,444)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 28.

WESTERN FUEL COMPANY, PETITIONER,

vs.

ANTONE GARCIA, AS ADMINISTRATOR OF THE ESTATE OF MANUEL SOUZA, DECEASED.

ON A CERTIFICATE FROM AND WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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No. 3195

United States

Circuit Court of Appeals

For the Ninth Circuit.

WESTERN FUEL COMPANY, a Corporation,
Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Appellee.

Apostles on Appeal.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,248.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,

Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,

Libelees.

Praecipe for Apostles on Appeal.

To the Clerk of the Above-entitled Court:

The libelee, Western Fuel Company, a corporation, having appealed to the United States Circuit Court of Appeals, for the Ninth Circuit, from the Final Decree of this Court, entered herein, you are hereby requested to prepare and certify the Apostles on Appeal, to be filed in said Appellate Court in due course. Said Apostles on Appeal are to include in their proper order and form the following papers and documents, to wit:

Original Libel.

Amended Libel.

Exceptions of Western Fuel Company to Libel.

Second Amended Libel.

Order Permitting Filing of Second Amended Libel.

Petition for Appointment of Guardian Ad Litem.

Order Appointing Guardian Ad Litem.

Exceptions of Respondent, Western Fuel Company, to Amended Libel.

Answer of Western Fuel Company to Amended Libel.

Testimony taken in Court and all exhibits introduced in evidence.

All orders of Court to which exceptions were made.

Final Decree.

Assignments of Error.

Opinion of the District Court.

Dated June 12th, 1918.

IRA S. LILLICK,
HARTLEY F. PEART,
Proctors for Libelee, Western Fuel Company.

[Endorsed]: Filed Jun. 12, 1918. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [1*]

Statement of Clerk U. S. District Court.

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,248.

TITLE OF CAUSE.

MARY SOUZA, and EVA SOUZA, WILLIE SOUZA, ELMA SOUZA, MABEL SOUZA and MANUEL SOUZA, by ANTONE GARCIA, Their Guardian Ad Litem (Later as Administrator of the Estate of MANUEL SOUZA, Deceased),

Libelants,

vs.

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*Page-number appearing at foot of page of original certified Apostles on Appeal.

WESTERN FUEL COMPANY, a Corporation, and HARRY NELSON and GEORGE WEISEL,

Respondents.

PARTIES.

Libelants: Mary Souza, and Eva Souza, Willie Souza, Elma Souza, Mabel Souza and Manuel Souza, by Antone Garcia, their guardian ad litem, and, also, Administrator of the estate of Manuel Souza, deceased.

Respondents: Western Fuel Company, a corporation, and Harry Nelson and George Weisel. **[1-a]**

PROCTORS

for

Libelants: Henry Heidelberg, Esq., and Chris. M. Bradley, Esq., both of San Francisco, California.

Respondents: Ira S. Lillick, Esq., and Hartley F. Peart, Esq., both of San Francisco, California.

PROCEEDINGS.

1917.

August 21. Filed verified Libel for damages for loss of life, in the sum of $50,000.

Issued Citation for the appearance of respondents, which Citation was afterwards, on August 24th, 1917, filed in this office by the United States Marshal, with his return of due service attached thereto.

Filed Petition for Order appointing Antone Garcia as Guardian

Ad Litem, for the purpose of prosecuting this action, of the minors, Eva Souza, Willie Souza, Elma Souza, Mabel Souza and Manuel Souza.

Filed Order Appointing Antone Garcia as Guardian *Ad Litem* for said minors.

September 24. Filed Exceptions to Libel by Western Fuel Company, a corporation.

Filed Exceptions to Libel by Harry Nelson and George Weisel, [1–b]

November 12. This cause came on regularly this day for hearing on the Exceptions of Respondents to the Original Libel, the Honorable, Frank H. Rudkin, District Judge for the Eastern District of Washington, designated to hold and holding this Court, presiding, and after argument, was ordered submitted.

16. Filed Memorandum Opinion by the Honorable Judge Rudkin, in which it was ordered that the Exceptions be overruled.

December 13. Filed Answer of Harry Nelson and George Weisel to Original Libel.

Filed Answer of Western Fuel Company, a corporation, to Original Libel.

1918.

March 15. Filed Order Allowing Libelant, Antone Garcia, Administrator, etc., to file First Amended Libel.

Filed First Amended Libel.

18. Filed Exceptions of Western Fuel Company, a corporation, to First Amended Libel.

Filed Answer of Western Fuel Company, a corporation, to First Amended Libel.

This cause came on regularly this day for trial, the Honorable M. T. Dooling, Judge, presiding. After argument of proctors for respective parties, the Court ordered that the Exceptions of Western Fuel Company, a corp., to the First Amended Libel be overruled, and that said libelant be allowed to *filed* an Answer to said First Amended Libel. The cause was then submitted to the Court for decision. [1-c]

April 30. Filed Opinion by the Honorable M. T. Dooling, Judge, in which it was ordered that libelants recover the sum of $9506 and costs, being the sum of $10,000 less $494 previously paid; and that the Libel be dismissed as to Nelson and Weisel.

May	3.	Filed Second Amended Libel.
	13.	Filed Final Decree.
	22.	Filed Notice of Appeal.
	24.	Filed Order Staying Execution ten days from date.
	28.	Filed Cost and Supersedeas Bond in the aggregate sum of $11,000.
June	12.	Filed one volume of Testimony taken in open court.
July	9.	Filed Assignment of Errors. **[1-d]**

In the Southern Division of the District Court of the United States in and for the Northern District of California, First Division.

IN ADMIRALTY.

MARY SOUZA, and EVA SOUZA, WILLIE SOUZA, ELMA SOUZA, MABEL SOUZA, and MANUEL SOUZA, by ANTONE GARCIA, Their Guardian Ad Litem,

Libelants,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,

Libelees.

Libel for $50,000 Damages.

To the Honorable M. T. DOOLING, Judge of the United States District Court in and for the Northern District of California, First Division:

The libel of Mary Souza, and Eva Souza, Willie

Souza, Elma Souza, Mabel Souza, and Manuel Souza, by Antone Garcia, their guardian *ad litem,* alleges as follows:

I.

Western Fuel Company now is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of California, regularly transacting business in said state.

II.

The above-named libelants Eva Souza, Willie Souza, Elma Souza, Mabel Souza, and Manuel Souza are minors of the ages respectively as follows: Eight years, five years, four years, three years, and six months.

On the 21st day of August, the above-entitled court duly gave and made its order appointing Antone Garcia guardian *ad litem* **[2]** of said minors for the purpose of commencing, and prosecuting to final judgment an action against the above-named libelees for and on behalf of said minors to recover all damages sustained by them by reason of the death of Manuel Souza, the father of said minors, caused by reason of and through the carelessness and negligence of said libelees, and to represent said minors in all proceedings in said action; said order has never been vacated, modified, or set aside, and ever since said 21st day of August, 1917, has been and still is in full force and effect.

III.

On the 5th day of August, 1916, said Manuel Souza was in the employ of libelee, Western Fuel Company,

a corporation, being engaged in the occupation of stevedore, his duty at said time consisting of the unloading of coal for said Western Fuel Company, a corporation, from the steamer "Tancred," working at said time in the hold of said vessel.

IV.

On said 5th day of August, 1916, and while said Manuel Souza was working, as aforesaid, on board of said vessel, and while in the employ and service of said Western Fuel Company, a corporation, said Manuel Souza lost his life, in the following manner, that is to say:

Said vessel was at said time at anchor in Oakland Creek, a navigable tributary of the bay of San Francisco, in the State of California. Said vessel was at said time under charter to Western Fuel Company, a corporation, and was loaded with coal consigned to said Western Fuel Company, a corporation, and said vessel was at said time lying alongside of Howard Wharf, located in said Oakland Creek, and was discharging coal from the main hatch of said vessel into hopper #2 of said wharf in the following manner:

Said coal was first loaded from the hold of said vessel into a steel bucket, or container, and when said bucket, or container, [3] was sufficiently loaded said bucket, or container, was hoisted to the heighth of 100 feet, or thereabouts, and thereupon said bucket or container, was transferred by means of a yard-arm, or boom, a distance of 50 feet, or thereabouts, into said hopper, or bunker, all of said operations of hoisting and transferring being done by means of an electric hoist, or winch, under the

supervision and control of George Weisel, engineer or winchman, in the employ of said Western Fuel Company, a corporation. When said bucket, or container, was inside of said bunker, or hopper, it was the duty of Harry Nelson, "dumpman" in the employ of said Western Fuel Company, a corporation, to "dump" said bucket or container in such manner as to cause the coal contained therein to discharge, or spill, into said hopper or bunker.

On said August 5th, 1916, libelees herein so negligently and carelessly performed said operations of transferring and dumping said bucket, or container, as to cause a great quantity of the coal therein contained to be discharged, or spilled, into the hold of said vessel, instead of being wholly discharged or spilled into the said hopper, or bunker, by reason of which negligence and carelessness of libelees herein, said Manuel Souza was struck upon the head by said coal so discharged, or spilled, into the hold of said vessel, and fatally injured, to wit, his skull being fractured, from which injury the said Manuel Souza soon thereafter and on the said 5th day of August, 1916, died.

V.

Said death of said Manuel Souza was caused by the carelessness and negligence of libelees herein, and without any negligence or carelessness on the part of said Manuel Souza.

VI.

Said Manuel Souza on the 5th day of August, 1916, was, and for a long time prior thereto had been, the husband of Mary Souza, libelant herein, and was on

said 5th day of August, 1916, the [4] father of Eva Souza, Willie Souza, Elma Souza, Mabel Souza, and Manuel Souza, minors of the ages of eight years, five years, four years, three years, and six months, respectively; said Mary Souza and said Eva Souza, Willie Souza, Elma Souza, Mabel Souza, and Manuel Souza, were at said time wholly dependent upon said Manuel Souza for maintenance and support. Said Manuel Souza at said time was of the age of thirty-eight years, being strong, able-bodied, and healthy, and a sober, hardworking, industrious man, and earning wages as stevedore in the amount of $35.00 per week.

VII.

On or about the 25th day of April, 1917, the Industrial Accident Commission of the State of California, after due proceedings before said body, duly and regularly made an order in favor of Mary Souza, and against the Western Fuel Company, a corporation, ordering said Western Fuel Company, a corporation, to pay to Mary Souza a certain sum of money, basing such award of said sum of money upon the finding of said Commission that said Manuel Souza came to his death while in the employ of said Western Fuel Company, a corporation, and while working as stevedore for said Western Fuel Company, a corporation; from the award made as aforesaid, said Western Fuel Company, a corporation, took an appeal to the Supreme Court of the State of California, which said Supreme Court of the State of California, on or about the 6th day of August, 1917, made an order reversing, annulling, and setting aside said

award so made by said Industrial Accident Commission to the said Mary Souza and as against the said Western Fuel Company, a corporation, on the grounds that said Industrial Accident Commission was without jurisdiction to make the same.

VIII.

By reason of the death of said Manuel Souza, so caused by the negligence and carelessness of libelees herein, libelants have suffered damages in the sum of Fifty Thousand Dollars ($50,000), no part of which has been paid. **[5]**

IX.

All and singular of the premises herein are true and within the admiralty jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libelants herein pray that process may issue in due form of law according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction against said libelees, and that they may be cited and admonished to appear and answer on oath all and singular the matters aforesaid, and that this Honorable Court would be pleased to decree the payment of the aforesaid damages with costs, and that libelants herein have such other and further relief as in law and justice they may be entitled to receive.

HENRY HEIDELBERG,
CHRIS. M. BRADLEY,
Proctors for Libelants. **[6]**

State of California,
City and County of San Francisco,—ss.

Antone Garcia, being duly sworn, deposes and

says: That he is the guardian *ad litem* of the minors in the above-entitled action, that as such guardian *ad litem* he is a libelant in the above-entitled action; that he has read the foregoing libel and knows the contents thereof, that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

ANTONE GARCIA.

Subscribed and sworn to before me this 21st day of August, 1917.

[Seal] HARRY H. SULLIVAN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Aug. 21, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [7]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY.

MARY SOUZA and EVA SOUZA, WILLIE SOUZA, ELMA SOUZA, MABEL SOUZA and MANUEL SOUZA, by ANTONE GARCIA, Their Guardian Ad Litem,
Libelants,

vs.

WESTERN FUEL CO., a Corporation, HARRY NELSON and GEORGE WEISEL,
Libelees.

(Petition for Order Appointing Guardian Ad Litem.)

Tn the Honorable M. T. DOOLING, Judge of the United States District Court in and for the Northern District of California, First Division:

The petition of Antone Garcia respectfully shows:

That Eva Souza, Willie Souza, Elma Souza, Mabel Souza, and Manuel Souza, are minors of the ages of eight years, five years, four years, three years, and six months; that the father of said minors is dead; that your petitioner is the godfather of said minors; that said minors have no guardian of either their persons or their estate appointed by will or otherwise.

That on the 5th day of August, 1916, at the city of Oakland, county of Alameda, State of California, Manuel Souza, father of said minors, sustained injuries, as a result of which he thereafter and on the 5th day of August, 1916, died, while engaged in the occupation of stevedore in the employ of libelee Western Fuel Co., a corporation, on the vessel "Tancred," owned by said Western Fuel Co., a corporation, while at anchor in [8] Oakland Creek, a navigable tributary of the bay of San Francisco, State of California, by and through the negligence of said libelees; that the wife and children of said Manuel Souza, deceased, desire to commence an action against said Western Fuel Co., a corporation, to recover all damages sustained by them by reason of the death of said Manuel Souza.

That it is necessary that a guardian *ad litem* be

appointed for said minors to commence and prosecute to final judgment on their behalf said contemplated action against said corporation to recover all damages sustained by them by reason of the death of their said father.

That annexed hereto is the written consent and request of the mother of said minors that petitioner be appointed as guardian *ad litem* for said purpose.

WHEREFORE your petitioner prays that an order be forthwith made appointing him guardian *ad litem* of said minors for the purpose aforesaid.

ANTONE GARCIA,
Petitioner.

HENRY HEIDELBERG and
CHRIS. M. BRADLEY,
Proctors for Petitioner. [9]

In the Southern Division of the District Court of the United States in and for the Northern District of California, First Division.

IN ADMIRALTY.

MARY SOUZA and EVA SOUZA, WILLIE SOUZA, ELMA SOUZA, MABEL SOUZA and MANUEL SOUZA, by ANTONE GARCIA, Their Guardian Ad Litem,
Libelants,

vs.

WESTERN FUEL CO., a Corporation, HARRY NELSON and GEORGE WEISEL,
Libelees.

Consent of Mary Souza to Appointment of Guardian Ad Litem.

To the Honorable District Court of the United States in and for the Northern District of California, First Division:

I, the undersigned, Mary Souza, mother of Eva Souza, Willie Souza, Elma Souza. Mabel Souza and Manuel Souza, minors of the ages of eight (8) years, five (5) years, four (4) years, three (3) years, and six (6) months, respectively, hereby consent and request that Antone Garcia be appointed guardian *ad litem* of said minors for the purpose of commencing on their behalf an action against the Western Fuel Co., a corporation, Harry Nelson, and George Weisel, to recover all damages sustained by them by reason of the death of their father Manuel Souza, which occurred through the negligence of said corporation and said Harry Nelson and said George Weisel, and for the purpose of prosecuting said action to final judgment.

Dated August ——, 1917.

Her
MARY X SOUZA.
Mark.

Witness to mark:
ANTONE GARCIA.

[Endorsed]: Filed Aug. 21, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [10]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY.

MARY SOUZA and EVA SOUZA, WILLIE SOUZA, ELMA SOUZA, MABEL SOUZA and MANUEL SOUZA, by ANTONE GARCIA, Their Guardian Ad Litem,

Libelants,

vs.

WESTERN FUEL CO., a Corporation, HARRY NELSON and GEORGE WEISEL,

Libelees.

Order Appointing Guardian Ad Litem.

Antone Garcia, having heretofore filed herein his petition praying for an order appointing him guardian *ad litem* of Eva Souza, Willie Souza, Elma Souza, Mabel Souza and Manuel Souza, minors, for the purpose of commencing and prosecuting to final judgment an action against Western Fuel Company, a corporation, Harry Nelson and George Weisel, to recover all damages sustained by said minors by reason of the death of their father, Manuel Souza, resulting from injuries sustained while engaged in the occupation of stevedore in the employ of libelee Western Fuel Company, a corporation, and while at work on the vessel "Tancred," chartered by said Western Fuel Company, a corporation, and while said vessel was at anchor in Oakland Creek, a navi-

gable tributary of the bay of San Francisco, in the State of California, on the 5th day of August, 1916, by and through the alleged negligence of said libelees.

And it further appearing to the Court that all of the allegations in the libel filed against Western Fuel Co., a corporation, Harry Nelson, and George Weisel, libelees, are, and each of them is, true; that the said Eva Souza, Willie Souza, Elma Souza, [11] Mabel Souza and Manuel Souza are minors of the ages of eight years, five years, four years, three years and six months, respectively, and that accompanying said petition of Antone Garcia is a nomination and petition in writing of Mary Souza, mother of said minors, requesting this Court to appoint said Antone Garcia as their guardian *ad litem* for said purpose.

And it further appearing to the Court that on the 5th day of August, 1916, said minors, Eva Souza, Willie Souza, Elma Souza, Mabel Souza and Manuel Souza, sustained injury through and by reason of the death of their father through the alleged negligence of said libelees Western Fuel Co., a corporation, Harry Nelson and George Weisel, and that in order to recover the damages sustained by them by reason of said death it will be necessary, on behalf of said minors, to commence and prosecute to final judgment an action against said Western Fuel Co., a corporation, Harry Nelson and George Weisel; and it appearing to the Court that it is necessary that a guardian *ad litem* be appointed for said minors, Eva Souza, Willie Souza, Elma Souza, Mabel Souza and Manuel Souza, to commence and prosecute to final

judgment said action and to represent them therein, and that Antone Garcia is a fit and proper person to be appointed such guardian *ad litem.*

NOW, THEREFORE, IT IS HEREBY ORDERED that said Antone Garcia be and he is hereby appointed guardian *ad litem* of said minors for the purpose of commencing and prosecuting to final judgment an action against said Western Fuel Co., a corporation, Harry Nelson, and George Weisel, for the purpose of recovering from them, and each of them, all damages sustained by said minors by reason of the death of their father on the 5th day of August, 1916, through the alleged negligence of said libelees.

Dated August 21, 1917.

WM. H. HUNT,

Judge of the District Court of the United States, Northern District of California, First Division. [12]

[Endorsed]: Filed Aug. 21, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [13]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY.

MARY SOUZA and EVA SOUZA, WILLIE SOUZA, ELMA SOUZA, MABEL SOUZA and MANUEL SOUZA, by ANTONE GARCIA, Their Guardian Ad Litem,

Libelants,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,

Libelees.

Exceptions to Libel (Western Fuel Company).

To the Honorable MAURICE T. DOOLING, Judge of Said Court:

The exceptions of libelee, Western Fuel Company, a corporation, to the libel filed in the above-named cause, allege:

I.

That said libel is insufficient and does not state facts sufficient to constitute a cause of libel against this libelee.

II.

That said libel is insufficient and does not state a cause of libel, in that it does not appear therefrom, nor can it be ascertained therefrom, under what statute libelants claim a cause of action.

III.

That said libel is uncertain, ambiguous and unintelligible for the same reasons that it is herein alleged to be insufficient.

IV.

That the pretended cause of action set forth in said libel is barred by the provisions of section 340 of the Code of Civil Procedure of the State of California. [14]

WHEREFORE, said libelee prays that the libel may be dismissed, with its costs herein.

HARTLEY F. PEART,
IRA S. LILLICK,
Proctors for Libelee, Western Fuel Company, a Corporation.

Due service and receipt of a copy of the within exceptions is hereby admitted this 22d day of Sept., 1917.

HENRY HEIDELBERG,
CHRIS. M. BRADLEY,
Proctors for Libelants.

[Endorsed]: Filed Sep. 24, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [15]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Monday, the 12th day of November, in the year of our Lord one thousand nine hun-

dred and seventeen. Present: The Honorable FRANK H. RUDKIN, District Judge for the Eastern District of Washington, Designated to Hold and Holding this Court.

No. 16,248.

MARY SOUZA et al.

vs.

WESTERN FUEL CO. et al.

Minutes of Court—November 12, 1917—Hearing on Exception to Original Libel.

(MINUTES OF HEARING ON EXCEPTIONS TO ORIGINAL LIBEL.)

This cause came on regularly this day for hearing of the exceptions to the libel herein, and after being argued by proctors for respective parties, the Court ordered said matter submitted. **[16]**

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 16,248.

MARY SOUZA et al.,

Libelants,

vs.

WESTERN FUEL CO., a Corporation, HARRY NELSON and GEORGE WEISEL,

Libelees.

(Opinion and Order Overruling Exceptions to Original Libel.)

HENRY HEIDELBERG and CHRIS. M. BRADLEY, for Libelants.

HARTLEY F. PEART and IRA S. LILLICK, for Libelees.

MEMORANDUM BY RUDKIN, DISTRICT JUDGE.

This is a libel against the Western Fuel Company and two of its servants or employees to recover damages for death by wrongful act.

The libel charges that the deceased, Manuel Souza, together with the two individual libelees, were engaged [17] in unloading coal from the steamship "Tancred" at the Howard Wharf in Oakland Creek by means of an electric hoist or winch, and that,

> "On said August 5th, 1916, libelees herein so negligently and carelessly performed said operation of transferring and dumping said bucket, or container, as to cause a great quantity of the coal therein contained to be discharged, or spilled, into the hold of said vessel, instead of being wholly discharged or spilled into the said hopper, or bunker, by reason of which negligence and carelessness of libelees herein, said Manuel Souza was struck upon the head by said coal so discharged, or spilled, into the hold of said vessel, and fatally injured, to wit, his skull being fractured, from which injury the said Manuel Souza soon thereafter and on the said 5th day of August, 1916, died."

The libelants are the surviving widow and minor children of the deceased.

The libelees have excepted to the libel on the ground that it does not state facts sufficient to constitute a cause of libel against them, and on the further grounds that it does not appear under what statute the libelants claim and that the cause of libel is barred by the one year Statute of Limitations.

Of course no right of action for death by wrongful act existed either at common law or in admiralty, and if such right of action exists in this case it must be by virtue of some statute of the state. I do not understand [18] however, that it is necessary to refer to or plead the statute relied on.

Section 377 of the Code of Civil Procedure contains the usual provision that when the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death. This section was later amended by section 1970 of the Civil Code, which changes in a measure the common-law rule of fellow-servants and possibly the common-law doctrine of assumption of risk.

Next in order of time comes the so-called Roseberry Act of 1911, which among other things, establishes the doctrine of comparative negligence, abrogates the defense of contributory negligence where the violation of any statute enacted for the safety of employees contributed to the injury, and also the doctrine of assumption of risk and the fellow-servant doctrine. This Act was followed in 1913 by the

Workmen's Compensation Act. Section 14 of that Act provides:

> "The term 'employee' as used in sections twelve to thirty-five, inclusive, of this act shall be construed to mean: every person in the service of an employer as defined by section thirteen hereof under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens and also including minors, but excluding any person whose employment is both casual and not in the usual course of the trade, business, [19] profession or occupation of his employer, and also excluding any employee engaged in farm, dairy, agricultural, viticultural or horticultural labor, in stock or poultry raising or in household domestic service."

Section 90 repeals all acts and parts of acts in conflict therewith.

The libelees earnestly insist that this statute takes away the right of action for death by wrongful act where the relation of master and servant exists, except as to the employees especially excluded by section 14, and that inasmuch as the deceased did not belong to any of the excluded classes, no right of action exists in favor of his widow and children.

The question thus presented is not free from difficulty. Inasmuch, however, as the Supreme Court of the state has held that the present libelants have no claim under the Workmen's Compensation Act, it would seem to follow that the employment of the deceased was not covered by that act and therefore that

prior laws are not inconsistent or in conflict with the later act.

The objection that the action is prosecuted by the widow and children instead of by the personal representative is in my opinion not well taken.

The claim that the deceased met his death through the negligence of fellow-servants is answered by the statutes of this state, and I am inclined to the opinion that the prosecution of the claim in the state courts under the [20] Workmen's Compensation Act is a sufficient excuse for the slight delay in failing to file the present libel within the year prescribed by law.

In any event, all question of law and fact involved in the case should be settled and determined in a single trial with but one appeal, and to that end the exceptions are overruled.

[Endorsed]: Filed Nov. 16, 1917. Walter B. Maling, Clerk. [21]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,248.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,

Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,

Libelees.

Order (Allowing the Filing of First Amended Libel).

Good cause appearing therefor,

IT IS HEREBY ORDERED that libelant, Antone Garcia, may file the within-amended libel.

Dated March 15, 1918.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Mar. 15, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk [22]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,248.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,
Libelees.

(First Amended) Libel for $50,000 Damages.

To the Honorable MAURICE T. DOOLING, Judge of the District Court of the United States, in and for the Northern District of California, First Division:

Now comes the above-named libelant, Antone

Garcia, and by leave of Court first had and obtained, files this his first amended libel:

I.

Western Fuel Company now is and at all the times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of California, and regularly transacting business in said State.

II.

Manuel Souza died intestate in the city of Oakland, county of Alameda, State of California, on the 5th day of August, 1916, being at the time of his death a resident of [23] the County of Alameda, State of California, and leaving estate therein.

Thereafter and on the 15th day of March, 1918, the Superior Court of the State of California, in and for the county of Alameda, by its order duly given, made and entered, appointed said Antone Garcia, libelant herein, administrator of the estate of said Manuel Souza, deceased, and directed that letters of administration upon said estate be issued to him upon his qualifying as such administrator.

Thereafter and on the 15th day of March, 1918, said Antone Garcia duly qualified as such administrator, letters of administration upon the estate of said deceased were thereupon duly issued to said Antone Garcia, and he ever since has been and now is the duly appointed, qualified and acting administrator of the estate of said Manuel Souza, deceased.

III.

On the 5th day of August, 1916, said Manuel Souza was in the employ of libelee, Western Fuel Company,

a corporation, being engaged in the occupation of stevedore, his duty at said time consisting of the unloading of coal for said Western Fuel Company, a corporation, from the steamer "Tancred," and was working at said time in the hold of said vessel.

IV.

On said 5th day of August, 1916, and while said Manuel Souza was working as aforesaid on board of said vessel, and while in the employ and service of said Western Fuel Company, a corporation, said Manuel Souza lost his life in the following manner:

Said vessel was at said time at anchor in Oakland Creek, a navigable tributary of the bay of San Francisco, in the State of California. Said vessel was at said time under the charter of the Western Fuel Company, a corporation, and was loaded with coal consigned to said Western Fuel Company, a corporation, and [24] said vessel was at said time lying alongside of Howard Wharf, located in said Oakland Creek, and was discharging coal from the main hatch of said vessel into hopper No. 2 of said wharf in the following manner:

Said coal was first loaded from the hold of said vessel into a steel bucket or container, and when said bucket or container was sufficiently loaded with coal said bucket or container was hoisted to a height of about 100 feet, or thereabouts, and thereupon said bucket or container was transferred by means of a yard-arm boom a distance of fifty (50) feet, or thereabouts, into said hopper or bunker. All of said operations of hoisting and transferring being done by means of an electric hoist or winch under the

supervision and control of George Weisel, engineer or "winchman" in the employ of said Western Fuel Company, a corporation. When said bucket or container was inside of said bunker or hopper it was the duty of Harry Nelson, "dumpman," in the employ of said Western Fuel Company, a corporation, to dump said bucket or container in such manner as to cause the coal contained therein to discharge or spill into said hopper or bunker.

On said August 5, 1916, libelees herein negligently and carelessly performed said operation of transferring and dumping said bucket or contained as to cause a great quantity of the coal therein contained to be discharged or spilled into the hold of said vessel, instead of being wholy discharged or spilled into said hopper or bunker, by reason of which negligence and carelessness of libelees herein, said Manuel Souza was struck upon the head by said coal so discharged or spilled into the hold of said vessel and fatally injured, to wit, his skull being fractured, from which injury the said Manuel Souza soon thereafter and on the 5th day of August, 1916, died. [25]

V.

Said death of said Manuel Souza was caused by the carelessness and negligence of libelees herein, and without any negligence or carelessness on the part of said Manuel Souza.

VI.

Said Manuel Souza on the 5th day of August, 1916, was and for a long time prior thereto had been the husband of Mary Souza, and was on the 5th day of August, 1916, the father of Eva Souza, Willie Souza,

Elma Souza, Mabel Souza and Manuel Souza, Jr., minors of the age of eight (8) years, five (5) years, four (4) years, three (3) years, and six (6) months respectively. Said Eva, Willie, Elma, Mabel and Manuel Souza were at said time wholly dependent upon said Manuel Souza for maintenance and support. Said Manuel Souza at said time was of the age of thirty-eight (38) years, being strong, able-bodied and healthy, and a sober, hard working, industrious man, and earning wages as stevedore in the amount of thirty-five dollars ($35) per week.

VII.

On or about the 25th day of April, 1917, the Industrial Accident Commission of the State of California, after due proceedings before said body, duly and regularly made an order in favor of Mary Souza, and against the Western Fuel Company, a corporation, ordering said Western Fuel Company, a corporation to pay to Mary Souza a certain sum of money, basing such award of said sum of money upon the finding of said Commission that said Manuel Souza came to his death while in the employ of said Western Fuel Company, a corporation, and while working as stevedore for said Western Fuel Company, a corporation; from the award made as aforesaid, said Western Fuel Company, a corporation, took an appeal to the Supreme Court of the State of California, which said Supreme Court [26] of the State of California, on or about the 6th day of August, 1917, made an order reversing, annulling, and setting aside said award so made as against the said Western Fuel Company, a corporation, on the grounds that said

Industrial Accident Commission was without jurisdiction to make the same.

VIII.

By reason of the death of said Manuel Souza, so caused by the negligence and carelessness of libelees herein, the heirs of said Manuel Souza as above set out have suffered damages in the sum of Fifty Thousand Dollars ($50,000), no part of which has been paid.

IX.

All and singular of the premises herein are true and within the admiralty jurisdiction of the United States, and of this Honorable Court.

WHEREFORE, libelant herein prays that process may issue in due form of law according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction against said libelees, and that they may be cited and admonished to appear and answer on oath all and singular the matters aforesaid, and that this Honorable Court would be pleased to decree the payment of the aforesaid damages with costs, and that libelant herein have such other and further relief as in law and justice he may be entitled to receive.

CHRIS. M. BRADLEY and
HENRY HEIDELBERG,
Proctors for Libelant. [27]

State of California,
City and County of San Francisco,—ss.

Antone Garcia, being duly sworn, deposes and says:

That he is the administrator of the Estate of Man-

uel Souza, deceased; that as such administrator he is libelant in the above-entitled action; that he has read the foregoing libel and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

ANTONE GARCIA.

Subscribed and sworn to before me this 15th day of March, 1918.

[Seal] HARRY F. SULLIVAN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Mar. 15, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [28]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,248.

ANTONE GARCIA, as Administrator of the Estate MANUEL SOUZA, Deceased,
Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,
Libelees.

Exceptions to First Amended Libel (Western Fuel Company).

To the Honorable MAURICE T. DOOLING, Judge of said Court:

The exceptions of libelee, Western Fuel Company, a corporation, to the first amended libel filed in the above-named cause, allege:

I.

That said first amended libel is insufficient and does not state facts sufficient to constitute a cause of libel against this libelee.

II.

That said first amended libel is insufficient and does not state a cause of libel, in that it does not appear therefrom, nor can it be ascertained therefrom, under what statute libelant claims a cause of action.

III.

That said first amended libel is insufficient and does not state a cause of libel in that it does not appear therefrom nor can it be ascertained therefrom how or wherein this libelee or the other libelees herein or any of them was or were negligent [29] in any manner whatsoever as regards the said Manuel Souza.

IV.

That said first amended libel is insufficient and does not state a cause of libel in that it does not appear therefrom nor can it be ascertained therefrom in what the negligence of this libelee or the other libelee herein or either or any of them consisted.

V.

That said first amended libel is uncertain, ambiguous and unintelligible for the same reasons that it is herein alleged to be insufficient.

VI.

That the pretended cause of action set forth in said first amended libel is barred by the provisions of Section 340, subdivision 3 of the Code of Civil Procedure of the State of California.

VII.

That the pretended cause of action set forth in said first amended libel is barred by the laches of libelant.

WHEREFORE, said libelee prays that the said first amended libel may be dismissed, with its costs herein.

IRA S. LILLICK and
HARTLEY F. PEART,
Proctors for Libelee, Western Fuel Company, a Corporation.

[Endorsed]: Service acknowledged this 18th day of March, 1918. Christopher M. Bradley and Henry Heidelberg, for Libelant. Filed March 18, 1918. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [30]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,248.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,

Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,

Libelees.

Answer to Western Fuel Company, a Corporation, to First Amended Libel.

To the Hon. M. T. DOOLING, Judge of the United States District Court, for the Northern District of California, First Division:

The answer of the Western Fuel Company, a corporation, to the first amended libel of Antone Garcia, as administrator of the estate of Manuel Souza, deceased, libelant, admits, denies and alleges as follows:

I.

Said libelee admits the allegations of Article One of said first amended libel.

II.

Said libelee is ignorant as to the allegations of Article Two of said first amended libel, other than the death of Manuel Souza August 5, 1916, and for that reason demands that strict proof be made of all the same with said exception, and each and every part thereof.

III.

Answering the allegations of Article Three of said first [31] amended libel said libelee admits that on or about the 5th day of August, 1916, said Manuel Souza was in the employ of said libelee and engaged in the occupation of stevedore and that his duty during the regular working hours at said time consisted of assisting in unloading coal for said libelee from the steamer "Tancred" and that during his working hours said Manuel Souza was working in the hold of said vessel; but in this behalf said libelee alleges that at said time and place the regular working hours of said Manuel Souza were from 7:00 A. M. until 11:00 A. M. and from 12 M. to 5:00 P. M., and in this behalf this libelee denies that said Manuel Souza was at work in the performance of his duty at the time he was injured as alleged in said first amended libel.

IV.

Answering unto the allegations of Article Four of said first amended libel said libelee admits that on or about the 5th day of August, 1916, the said Manuel Souza lost his life on board of said vessel; that said vessel was at said time at anchor at Oakland Creek, a navigable tributary in the Bay of San Francisco, in the State of California. Said libelee alleges that said vessel at said time was, and still is, owned by Wilhelm Wilhelmsen. Said libelee further alleges that said vessel was at said time under charter to the Western Fuel Company, and that said corporation was the owner of the coal contained in said vessel at the time that said vessel was lying alongside

of Howard Wharf, located on said Oakland Creek.

V.

Further answering said Article Four said libelee denies that said Manuel Souza lost his life while he was working as aforesaid or otherwise, and/or while in the employ and/or service of this libelee; and this libelee denies that this libelee or either or any of the libelees herein on August 5th, 1916, or at any other [32] time in discharging the cargo of said steamer as alleged in said first amended libel or otherwise negligently and/or carelessly performed the operation of transferring and/or dumping said or any bucket, and/or container, so as to cause a great or any quantity of the coal therein contained to be discharged and/or spilled into the hold of said steamer; and denies that by reason of said or any negligence and/or carelessness of the libelees herein or any of them said Manuel Souza was struck upon the head or otherwise by said or any coal or at all, discharged or spilled into the hold of said vessel and/or fatally injured, or that his skull was thereby fractured; and this libelee denies that it was negligent or careless or that any of the libelees herein were negligent or careless in any particular in the operation of transferring or dumping any buckets containing coal out of the hold of said vessel or that said Manuel Souza was struck or injured or killed by reason of any negligence or carelessness of this libelee or any of the libelees herein, and in this behalf said libelee alleges that said coal was being discharged in the customary and usual manner, and that at, and before, the time said coal was being discharged into the hop-

pers, and/or bunkers, said Manuel Souza well knew and was familiar with the condition of the holds of said steamer and the conditions pertaining to the discharge of said coal into said hoppers, and/or bunkers, and that if the neglect of anyone, other than Manuel Souza contributed to the accident which resulted in the death of said Manuel Souza, it was the neglect of a fellow-servant of said Manuel Souza.

VI.

Further answering Article Four of said first amended libel said libelee alleges that at the time of the accident complained of, to wit: at the hour of 11:50 o'clock A. M. of said 5th day of [33] August, 1916, and during the hour allowed said Manuel Souza for his lunch, said Manuel Souza was in the hold of the said vessel by reason of his own voluntary act, and not for the purpose of attending to any duty arising out of the course of his employment, and said Manuel Souza was so injured, at a time prior to the time when under the terms of his employment he was to return to work, and in violation of instructions which had theretofore been given to said Manuel Souza not to stand around the hold of said vessel, nor to go into or upon said vessel until time to resume his work, but notwithstanding these instructions, and in violation thereof, said Manuel Souza, at the time said injury occurred, was standing about under the buckets that were being raised from the hold of the said steamer and at said time and place was neither working nor attending to any duty in connection with his said employment.

VII.

Answering unto Article Five of said first amended libel, said libelee denies that the death of said Manuel Sousa was caused by the negligence, and/or carelessness, of the said libelee; but in this behalf alleges that the death of said Manuel Souza from injuries received upon the occasion described in said first amended libel, was directly caused by the carelessness and negligence of said Manuel Souza and without any carelessness or negligence whatever on the part of said libelee, its agents, servants, employees, or either, or any, thereof; and further alleges that the condition of the holds of said vessel, and the movement of buckets described in said first amended libel, and the general conditions pertaining to the discharging of coal from said holds of said vessel to the said hoppers, and/or bunkers, upon the wharf, were well known to said Manuel Souza, and that the conditions under which said vessel was being discharged were neither insecure, unsafe or dangerous in any particular. [34]

Said libelee further alleges that if the negligence of anyone other than Manuel Souza contributed to the accident which resulted in the death of said Manuel Souza in said first amended libel complained of, it was the negligence of a fellow servant of said Manuel Souza.

VIII.

Said libelee is ignorant as to the allegations of Article Six of said first amended libel, and for that reason demands that strict proof be made of the same, and each and every part thereof, but admits

that the said Manuel Souza was earning wages as a stevedore in the sum of not more than Seventeen and 35/100 ($17.35) Dollars per week.

IX.

Said libelee denies that by reason of the death of said Manuel Souza that his heirs have suffered damage in the sum of Fifty Thousand ($50,000.) Dollars, or any other sum whatsoever; and denies that this libelee or any of its agents or servants were negligent or careless in any manner whatsoever, or that this libelee or any of its agents or servants caused the death of said Manuel Souza.

X.

And as a further and separate defense to the alleged cause of first amended libel, libelee further alleges:

1.

That the death of said Manuel Souza was caused by the negligence and carelessness of the said deceased in that, in violation of the instructions of said libelee and of the terms of his employment, he voluntarily went upon said vessel and down into the hold of said vessel prior to the time said deceased was to resume his employment; and that at said time, to wit, at 11:50 o'clock [35] A. M., or thereabouts, of said 5th day of August, 1916, said Manuel Souza voluntarily and without duty or obligation upon his part to said libelee, and negligently and carelessly stood in the hold of said steamer below the ascending buckets of coal in such a position that coal spilling over the edge of said buckets during their ascent, or from said hoppers might strike him, and that

said deceased was so struck by a lump of coal which spilled or fell from the top of one of said ascending buckets of coal, or from said hopper, so causing the injuries to said Manuel Souza from which his death ensued.

2.

That said decedent had worked and been employed as a stevedore in unloading coal from ships with similar apparatus for many years and that he then and there well knew that coal frequently fell from ascending buckets or spilled from the hopper into which the buckets were dumped, and that in the use of such machinery and apparatus in good and sound and workable condition some coal frequently dropped as aforesaid, into the hold of a vessel beneath; that said deceased was guilty of gross negligence in so as aforesaid voluntarily placing himself in a position to be injured from a plain, patent, known and obvious danger.

XI.

And for a further and separate defense to the alleged cause of libel, said libelee further alleges:

1.

That said death resulting from the alleged injuries and damage to said Manuel Souza was proximately caused by, and proximately resulted from, an ordinary risk of the work in which said Manuel Souza was then engaged, and that said risk was obvious, [36] apparent, patent and known to and fully comprehended, understood and appreciated by said Manuel Souza at all of the times therein mentioned.

2.

That said death resulting from said alleged injuries and said damage to said Manuel Souza was proximately caused by, and proximately resulted from, an ordinary risk of the employment of said Manuel Souza.

XII.

And for a further and separate defense to the alleged cause of libel said libelee further alleges:

1.

That the said steel bucket or container, and the said yard-arm boom and the said hopper or bunker and the said electric hoist all in said first amended libel described and each and every part and portion thereof, were at the time of the said accident resulting in the death of said Manuel Souza as in said first amended libel alleged, of the most modern and improved type of machinery and equipment for the purposes for which used and were in safe and sound condition and in good working order.

XIII.

And for a further and separate defense to the alleged cause of libel, said libelee further alleges:

1.

That the pretended cause of action set forth in said first amended libel is barred by the provisions of Section 340, subdivision 3 of the Code of Civil Procedure of the State of California.

2.

That the pretended cause of action set forth in said first amended libel is barred by the laches of the libelant. **[37]**

WHEREFORE, said libelee prays that libelants take nothing by their pretended cause of libel, and that said first amended libel be dismissed as to the libelee, Western Fuel Company, and that it have judgment against said libelant for its costs incurred herein.

WESTERN FUEL COMPANY,
By C. P. HEATON,
President.

IRA S. LILLICK and
HARTLEY F. PEART,
Proctors for Libelee, Western Fuel Company.

State of California,
City and County of San Francisco,—ss.

C. P. Heaton, being first duly sworn, deposes and says: That he is an officer of the libelee, Western Fuel Company, a corporation, to wit, the president thereof, and as such officer is authorized to make this affidavit on its behalf; that he has read the foregoing answer and knows its contents, and that it is true as he verily believes.

C. P. HEATON.

Subscribed and sworn to before me this 18 day of March, 1918.

[Seal] T. L. BALDWIN,
Deputy Clerk U. S. Dist. Court, Northern Dist. of California.

Service of copy of the within Answer admitted this 18th day of March, 1918.

CHRISTOPHER M. BRADLEY and
HENRY HEIDELBERG,

For Libelants.

[Endorsed]: Filed March 18, 1918. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [38]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Monday, the 18th day of March, in the year of our Lord one thousand nine hundred and eighteen. Present: The Honorable MAURICE T. DOOLING, District Judge.

No. 16,248.

MARY SOUZA et al.

vs.

WESTERN FUEL CO. et al.

Minutes of Court—March 18, 1918—Trial.

(MINUTES OF TRIAL.)

This cause came on regularly this day for hearing of the issues joined herein. Henry Heidelberg, Esq., and Chris. M. Bradley, Esq., were present as proctors for and on behalf of libelants. Ira S. Lillick, Esq., and Hartley F. Peart, Esq., were present for and on behalf of libelees. Mr. Peart filed excep-

tions to first amended libel, which the Court ordered overruled. On motion of Mr. Peart, the Court ordered that libelees be and they are hereby allowed to file answer to first amended libel. Mr. Heidelberg made opening statement, and called Antone Garcia, Joe Costa, Manuel Repose, August Silva, Joe Mendonsa, Anton Lima, Frank Duart, J. Swartz, Harry Nelson and Mary Souza, each of whom was duly sworn and examined on behalf of libelants and introduced in evidence certain exhibits which were filed and marked Libelants' Exhibit "A" (Letter of Administration Copy) and Libelants' Exhibit "B" (Photo). Mr. Heidelberg also introduced in evidence a certified copy of marriage certificate of Manuel Souza and Mary Rocha, which was filed and marked Libelants' Exhibit "C." Mr. Peart introduced in [39] evidence two photos, which were filed and marked respectively Libelees' Exhibits 1 and 2, and called George Hayes and John Benson, who were each duly sworn and examined on behalf of libelees. Mr. Peart recalled Harry Nelson, who was further examined. Mr. Heidelberg recalled Manuel Repose for further examination. The proctors for the respective parties then argued the cause, and stipulated that the ship on which Manuel Souza met his death was a Norwegian vessel chartered to Western Fuel Co., under a five (5) year charter. Further ordered that libelants have five (5) days within which to file briefs and libelees have five (5) days within which to file answering briefs. On motion of Mr. Heidelberg, the Court ordered that libelants be, and they are hereby allowed to withdraw

Libelants' Exhibit "B" (Photo) from the files of this cause. **[40]**

In the District Court of the United States, in and for the Southern Division of the Northern District of California, First Division.

Before Hon. M. T. DOOLING, Judge.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,

Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HAROLD NELSON and GEORGE WEISEL,

Respondents.

(Testimony Taken in Open Court.)

Monday, March 18, 1918.

COUNSEL APPEARING:

For the Libelant: CHRIS. M. BRADLEY, Esq., and HENRY HEIDELBERG, Esq.

For the Respondents: IRA S. LILLICK, Esq., and HARTLEY F. PEART, Esq.

Testimony of Antone Garcia, for Libelant.

ANTONE GARCIA, called for the libelant, sworn.

Mr. BRADLEY.—Q. Your name is Antone Garcia? A. Antone Garcia.

Q. Where do you live?

A. I live at 176 Second street.

Q. What is your occupation?

(Testimony of Antone Garcia.)

A. My occupation is assistant agent for the Southern Pacific Company, foot of Boardway.

Q. How long have you been so occupied?

A. I have been occupied at that position for the last ten years; working for the Southern Pacific Company for the last eighteen years.

Q. Prior to that time what was your occupation?

[41]

A. I have been stevedore, the same as a freight-handler, at Long Wharf; off and on I used to work at Oakland Pier.

Q. Are you the same Antone Garcia who was, on the 15th of March, 1918, appointed by the Superior Court of the county of Alameda, State of California, administrator of the estate of Manuel Souza, deceased? A. That is me.

Mr. BRADLEY.—You have no objection to offering a copy of the letters?

Mr. PEART.—No.

Mr. BRADLEY.—We offer as Libelant's Exhibit "A" a copy of the letters of administration.

Q. Did you know Manuel Souza in his lifetime.

A. Yes.

Q. How long had you known him prior to his decease? A. About 30 or 32 years.

Q. Where did you know him?

A. I know him from Honolulu.

Q. And in Oakland? A. Yes.

Q. Do you know his family? A. Yes.

Q. Of whom does the family consist?

A. Well, what do you mean?

(Testimony of Antone Garcia.)

Q. I will withdraw that question. Was Manuel Souza a married man? A. Yes.

Mr. PEART.—Don't get to leading him too much.

Mr. BRADLEY.—I think the Court can control that. Do you know his wife? A. Yes.

Q. His wife at the present time, what is her name?

A. Mary Souza.

Q. How long have you known her?

A. I have known her for the last fourteen years.

Q. Did you know the parties before they were married? A. No, I did not—yes, I did.

Q. Do you know the children of Manuel Souza?

A. Yes.

Q. How many are there living?

A. There are five of them.

Q. How many of them were alive at the time Manuel Souza lost his [42] life?

A. There were four of them.

Q. How long after he lost his life, if you know, was the fifth child born?

A. Four or five months after.

Q. Where does this family live?

A. They live at—I forget just the number of the house, but they live at the corner of Second and Jackson, in Oakland.

Q. What was the occupation of Manuel Souza?

A. A coal shoveler or stevedore.

Q. Do you know what his family relations were with reference to being a happy, contented family or not? A. Yes.

Q. Are you familiar with the provision he made

(Testimony of Antone Garcia.)

for the support and maintenance of his family and his children? A. Yes.

Q. What were his habits and disposition toward his family in those respects?

A. He treated his family awfully nice, provided them with everything that they needed; he was a man that would give his wife his wages.

Q. What were the habits of Manuel Souza with reference to being an industrious workman, or not?

A. He was a hard-working man.

Q. What with reference to his personal habits, were they good or bad?

A. He was a good man all over, a man that you never heard him swear or anything like that; just go to work in the morning, looking for day's work; if he could not get work shoveling, he would go to work on lumber; if he could not get any lumber, he would load cement; a regular rustler, what I would call a rustler.

Q. Did he do any other kind of work than shovel coal, occupy any position superior or inferior to that at any time, in your knowledge?

A. As I said, if he couldn't get any job shoveling, he would go to work loading cement and handling lumber, such things as that.

Q. Within your knowledge, did he ever act as hatch-tender? [43]

A. Sure; once in a while.

Q. Is that a higher or lower grade of employment than stevedoring or shoveling coal?

A. That is a higher grade of employment; they

(Testimony of Antone Garcia.)

are responsible for the crew down in the hatches.

Q. Can you state whether or not he was an efficient man at that kind of work.

A. He was an efficient man at that kind of work; he was a nice man all over.

Q. From your experience and observation, of your own knowledge, do you know what wages are paid hatch-tenders in that vicinity for that kind of work?

A. At the time that I used to be stevedoring myself they used to pay the hatch-tenders $6 a day.

Q. You do not presume to state that you know what the wages were about the time he lost his life?

A. No, I can't just exactly say the wages, but at the time I was stevedoring, and the time he was coal-shoveler, they used to get a dollar more than stevedores—the hatch-tenders was paid a dollar more, on account of being responsible for the men that are downstairs.

Q. Do you know what the education of Manuel Souza was?

A. I know Souza was pretty well educated.

Q. Where did he get his schooling if you know?

A. He got his education at St. Louis College, in Honolulu.

Q. Do you know what the rank of that college is, and grade?

A. It is a nice school, that I know of; it is a high school; it is a college at Honolulu, and he went through there—that is, he went to school; of course, I don't know, but it seems to me high-tone people go there to get their education, in St. Louis College.

(Testimony of Antone Garcia.)

Q. Is there a high school in Honolulu?

A. St. Louis College is a commercial school.

Q. Mr. Garcia, are you familiar with the proceedings that were instituted before the Industrial Accident Commission of the State [44] of California in behalf of Mrs. Souza and her minor children to enforce a claim under the workmen's compensation law?

Mr. LILLICK.—I object to that as immaterial, irrelevant and incompetent; I presume, under the theory of the libelant, they must show reasons for failing to file this case within the one-year period; the fact that such a proceeding had been instituted would be of some materiality, but otherwise we have an objection to it as being wholly immaterial, irrelevant and incompetent.

Mr. BRADLEY.—Counsel has anticipated the purpose of this line of questions.

Mr. PEART.—That is admitted in the answer filed to the first amended libel, that these proceedings were begun.

Mr. BRADLEY.—Is it admitted in the second?

Mr. PEART.—Yes.

Mr. BRADLEY.—And the proceedings were constantly carried through with diligence for the period of something like a year, and the decision of the Supreme Court of the State was rendered one day after the expiration of one year after the date of the accident, the accident being on the 5th of August, 1916, and the decision of the Court finally disposing of the matter being on August 6, 1917.

(Testimony of Antone Garcia.)

Mr. PEART.—Yes, within a day or two; I don't remember as to it exactly. Mr. Bradley knows better than I, but the record shows very closely. That is all.

Cross-examination.

Mr. PEART.—Q. Mr. Garcia, were you working with Mr. Souza at the time that he was killed?

A. No.

Q. How long since you had been working as a stevedore yourself? A. With Manuel Souza?

Q. No. A. I will tell you, about 13 years.

Q. About 13 years?

A. Thirteen years before this. [45]

Q. You have been at some other occupation for the last 13 years, then? A. Yes.

Q. Have you any recollection of Mr. Souza's marriage to Mrs. Souza? A. I do.

Q. Did you know him at that time? A. I did.

Q. Was it generally known among his friends, of whom you were one, that he had been married?

A. Yes, and I knew his family.

Q. Had you ever visited him at his home there?

A. Yes.

Q. You said that Mr. Souza was educated at a college in Honolulu? A. Yes.

Q. He impressed you as being educated?

A. He did not impress me; I knew it.

Q. You knew it? A. Yes.

Q. You knew that he was an educated married man? A. Yes.

Q. And an industrious man? A. Yes.

(Testimony of Antone Garcia.)

Q. You also told us that Mr. Souza occasionally worked as a hatch-tender? A. Yes.

Q. And that was a superior position, a higher position, than that of a stevedore? A. Yes.

Q. Because the hatch-tender is responsible for the crew down in the hatch. Is that right? A. Yes.

Q. How is he responsible? What does he have to do?

A. He has to look out for the tub coming out, and if any lumps go down he has to holler.

Q. Any lumps falling out of the tub or the hopper?

A. And if anything is coming toward the hatch, coming down, he is supposed to holler to them.

Q. Supposed to holler to the men in the hatch?

A. Yes.

Q. When you were working as a stevedore, did you work all the time?

A. Well, not all the time. For instance, I made my [46] living at it. Sometimes I used to work months and months, one after another, and once in awhile I would be away for three or four days, and if there was not any coal coming in I would go out and tackle something else.

Q. Your work, so far as unloading coal was concerned, depended on there being ships with coal there to be unloaded?

A. At the time I was stevedore, there used to be all kinds of ships of the Southern Pacific down at Long Wharf; sometimes we couldn't get them all.

Q. Sometimes there would not be any ships at all?

(Testimony of Antone Garcia.)

A. Yes, sometimes there would not be any ships at all.

Q. You don't know anything about how steadily Mr. Souza was employed for the last 13 years, do you?

A. No, not exactly; I could not probably say exactly to the minute what he done; occasionally you will see a man when he is working leave his house and come back from the coal place covered with coal or full of cement, or whatever else he was working with; more or less I can say he has been working.

Q. You would have to be pretty close to the man to know whether he was working?

A. He lives only two doors from me.

Q. Two doors from you?

A. No, three doors away from me.

Q. What have you been doing for the last 13 years?

A. I have been assistant agent for the Southern Pacific Company—not thirteen years, but ten years.

Q. You would not see Mr. Souza every day, would you? A. Pretty near every day.

Q. Do you want the Court to understand that you know that Mr. Souza has been working every day for the past thirteen years?

A. I don't say he has been working every day.

Q. Don't you think it would be a pretty fair average to say that he was working about two-thirds of the time? [47] A. Probably a little better.

Redirect Examination.

Mr. BRADLEY.—You have known this man how long, did you say?

(Testimony of Antone Garcia.)

A. I knew Souza for 30 or 32 years.

Q. Do you know how old he was when he lost his life?

A. I knew Souza was about 38 years old when he died—38 or 39, somewhere around there.

Q. By reason of knowing him since he was an infant, as you state, did you take any personal interest in him and his family?

A. I also knew him when he was a baby.

Q. Did you take any special interest in his family and its welfare?

A. No more than any other person I knew as well; generally when you are neighbors with a man you take an interest in him.

Q. Your knowledge of his habits and industry and family relations, as you have explained to the Court, were derived by reason of your long acquaintance with him, and your living neighbors to him?

A. Yes.

Testimony of Joe Costa, for Libelant.

JOE COSTA, called for the libelant, sworn.

Mr. HEIDELBERG.—Q. Where do you live?

A. 541 Myrtle Street, Oakland.

Q. Where were you born?

A. Hawaiian Islands.

Q. How long have you been living in the United States? A. Thirty years.

Q. Are you a citizen of this country? A. Yes.

Q. What is your business? A. Stevedore.

Q. What was your business on August 5, 1916?

(Testimony of Joe Costa.)

A. I was a foreman of stevedores.

Q. Where were you working on that day, and who for?

A. For the Western Fuel Company, at the steamer "Tancred." [48]

Q. What time did you go to work in the morning, Mr. Costa? A. I was working from 7 to 12.

Q. You took a lunch time of how long?

A. I used to take lunch time from 12 to 1.

Q. You knew Manuel Souza, did you? A. Yes.

Q. Do you know what ship shift Manuel Souza was on that day?

A. He was on the morning shift, and he was supposed to relieve me from 12 to 1.

Q. Supposed to relieve you from 12 to 1?

A. Yes.

Q. What hatch was he working in in the morning?

A. On No. 4.

Q. What hatch did he switch to at noon?

A. No. 2.

Q. Why was that done?

A. On account of No. 2 having more coal than the rest of them, and they wanted to try to get the ship on so that she could sail.

Q. Before we go any deeper into this, I would like you to explain to the Court—I have here this picture which it is stipulated is a correct representation, and also I have here this which is an enlargement of this picture—I wish to give the Court the larger picture, and I think if you will keep this before you you can understand the explanation that this witness will

(Testimony of Joe Costa.)

give of just how the coal is unloaded. Will you explain to the Court just the method in which the coal is loaded into the buckets, then the way it is hoisted, how it is taken across the yard-arms and then how it is dumped and sent back?

A. I was in the No. 2 hatch, down there in the hold, working, and that boom that is sticking out, which has a little trolley that runs out there, that is the one that brings out the grab-bucket or tub which goes down in the hold and gets the coal and comes up and dumps it where that man is standing there; that is what they call the hoper, where the coal comes down and goes into the car underneath the hopper, down below where the wheels of the house is, way down here, [49] right on top of these rails; at the time we were working with tubs and the tubs came right up, and they have a man here who opens the catch of the tub and dumps the tub into that hopper where that man is standing, or a little lower, and it dumps in there, and it ain't supposed to do down.

Q. I think if you will look at picture 2, there in the large picture, you will see a man stationed right in there. What is that man doing?

A. That is in the middle of the tower.

Q. There is a man there? A. Yes.

Q. What is he doing there?

A. I don't know what he is doing at the present time, because they are working with hoppers at the present time.

Q. Is that man in the position he would be in if he was dumping the bucket? A. Yes.

(Testimony of Joe Costa.)

Q. Where does the engineer stay?

A. Right here on the next house, right alongside of the man that is dumping.

Q. The house with the windows? A. Yes.

Q. What machinery is that?

A. It runs by electricity.

Q. Is it in the form of a hoist or drum, something like that?

A. It has got two big drums in the back, it has falls around it, and he opens his two levers, which gives him the power to hoist it and lower it down.

Q. Manuel Souza had nothing to do with the operation of this machine at all?

A. No. I don't like to object, but I think that is a little too much leading.

Mr. HEIDELBERG.—Q. Do you know Harry Nelson?

A. I might know him by sight.

Q. As hatch-tender, you say it is your duty to look out for the men? A. Yes.

Q. What do you mean by that?

A. That is, to look out that they [50] do their work, and if there is anything out of order, to tell them what to do.

Q. Further, as to taking care of the men, for the protection of the men, what do your duties consist of?

A. We have to look out for anything that goes wrong with the coal; if there is anything going down we sing out to them to get out of the way, if they can, if anything comes out.

(Testimony of Joe Costa.)

Q. What do you mean, if anything comes out? Does that mean while the bucket is going out, or after the bucket has been dumped?

A. While the bucket is going up or down.

Q. While the bucket is going up or down?

A. You have to look out for them.

Q. You were the hatch-tender working on this ship at that time, were you? A. I was.

Q. It was your duty at that time, if you saw anything, to cry out?

A. It was my duty, if I saw anything, to sing out, but I was down below giving them a hand, so I didn't see it; but there was a man that was working for me who hollered ahead of time, and they couldn't get away.

Q. We will get at that later on. I wish to ask you if you did at that time see this coal coming down and yell out yourself, yell warning?

A. Not until after I heard some other hollering, and then I tried to get away myself, and I got hit myself, but it didn't damage me much; it was not only one lump that came down, but there was a great, big bucketful that went all over the hatch.

Q. What did this bucket consist of, what kind of coal?

A. It was Wellington coal, mostly all lumps.

Q. In other words, it was hand-loaded coal?

A. It was big, for the most part picked up by hand.

Q. Do you know what the duties of this man Nelson were previous [51] to August 5, 1916?

A. I could not tell you exactly what he was doing,

(Testimony of Joe Costa.)

but I seen him when he was upstairs working—working for the yard.

Q. Now, do you know whether or not August 5, 1916, was the first day he had ever worked on this bucket as dump man?

A. That was the first time I ever seen him dump.

Q. Did the hatch-tender give any signal for the raising of this bucket? A. They used a whistle.

Q. Did you blow a whistle for the bucket that day?

A. I blew a whistle to take it up.

Q. What time was it that that bucket was raised?

A. That was just about within a half a minute to twelve, when the lumps came down in the hatch; the whistle was blowing at 12 o'clock, sharp.

Q. The whistle was blowing at 12 o'clock sharp?

A. Yes.

Q. When the coal came down? A. Yes.

Q. Now, did any coal fall out of the bucket while that bucket was going upward? A. No.

Q. How far over from where it stopped after it was raised—you get my meaning—how far over did it have to travel on that yard-arm or boom into the hopper before it dumped?

A. Twenty-five feet.

Q. About 25 feet? A. Yes.

Q. The dump-man, do you know anything about his duties, from your association with him?

A. The dump-man?

Q. Yes, about how he is supposed to have the bucket into the hopper before it dumps? He is supposed to—

(Testimony of Joe Costa.)

A. To have it into the hopper before he dumps any.

Q. I believe you have worked as hatch-tender, have you not? A. Yes.

Q. In fact, you were working as hatch-tender on this day? A. Yes. [52]

Q. What are the wages for hatch-tender, as compared with a stevedore?

A. Six dollars a day; some firms do not pay that, but the most part of them they do.

Q. What did stevedores get working on August 5, 1916—what were their wages?

A. Five dollars, nine hours work.

Q. Since that time, has there been any increase?

A. There was a little increase a little afterwards; we have got a raise now.

Q. Is it the practice of stevedores to work overtime a great deal and Sundays?

A. They will work night and day if they can stand it.

Q. How long have you known Manuel Souza?

A. Ten years.

Q. What kind of a workingman was Manuel Souza? A. He was an all-around man.

Q. Was he a hard-working, industrious man?

A. He was what you would call a regular, hard-working man; he would take a job, and when he got through he would go around, if he had nothing to do, and look for something else; he was a man who liked to keep busy all the time.

Q. Did he work Sundays and holidays, to your knowledge? A. A great deal, yes.

(Testimony of Joe Costa.)

Q. Did he work as hatch-tender at any time that you know? A. Yes.

Q. How much time did he work as hatch-tender?

A. I couldn't exactly tell you; quite often he was working as hatch-tender.

Q. Was he an efficient workman as a hatch-tender, if you know? A. Yes.

Q. Did he do his work well as hatch-tender?

A. Yes.

Q. Can you give us any kind of idea what wages stevedores make unloading coal and cement and lumber?

A. If he is a good hustler to work, he can average all the way from $25 to $35 a week and sometimes over that, but to give an average all the way [53] through, year by year, they average $35 a week easy.

Q. How much do you average the year around?

A. I can average $45 a week.

Q. Was Manuel Souza a hard-working man, if you know? A. Very hard.

Q. Did he look for work? A. Yes.

Q. You look for work, too, I suppose?

A. I guess I do.

Q. Do you find any difficulty keeping busy?

A. I always do.

Q. You always do what?

A. Find something to keep me busy.

Q. You do not find any difficulty keeping busy; you mean you always keep busy; is that it?

A. Yes.

Q. Do you know Mrs. Souza?

(Testimony of Joe Costa.)

A. I know her, yes.

Q. What was the general reputation in the neighborhood, as to whether they were married, Mr. and Mrs. Souza?

A. I couldn't exactly tell you, but I believe they got married; I knew them after they got married.

Q. You know of his children? A. Yes.

The COURT.—Is there any serious question about this marriage?

Mr. PEART.—It has been disputed, but I do not think we will go into it any further. It has been merely formally. If the lady says she is married, that is the end of it.

Mr. HEIDELBERG.—We have a copy of the certificate. The original is not here. That is all.

Cross-examination.

Mr. PEART.—Q. Mr. Costa, you say that a hatchtender's duties are to look out for men down in the hatch below? A. Yes.

Q. And you gave the signal to hoist this particular bucket? A. Yes.

Q. About half a minute before 12 o'clock?

A. Yes.

Q. And you were down below, and not on the hatch? A. I was down below, yes. [54]

Q. Down with the men?

A. Down with the men.

Q. Now, you say that Mr. Souza was working at the time—did I understand you correctly?

A. Yes.

Q. Isn't it a fact that Mr. Souza went to lunch

(Testimony of Joe Costa.)

at eleven o'clock that day? A. He did, yes.

Q. How much time is allowed by the company for lunch? A. One hour.

Q. Was Mr. Souza in your gang?

A. No, he was in Frank Duarte's gang.

Q. He was in Frank Duarte's gang? A. Yes.

Q. Frank Duarte was the other hatch-tender, was he not? A. Yes.

Q. Had Frank Duarte's gang gone to work?

A. No, but this fellow Manuel Souza went in ahead of time, and took this other fellow by the name of Silva's place, because Silva wanted to change his shirt; you have to strip off down there before you go to work, you work awfully hard and sweat.

Q. Was Mr. Souza a friend of this man?

A. Yes.

Q. What was his name?

A. Gus Silva, they called them.

Q. So Mr. Souza, belonging to Frank Duarte's gang, came down ahead and took Silva's place while Silva went in and changed his shirt? A. Yes.

Q. Where was Silva wanting to go?

A. He was getting ready to go to lunch.

Q. He wanted to go to lunch himself, then?

A. Yes.

Q. Were the men working in coal right in the open hatch, or were they cleaning up the hold?

A. They were in the open hatch at the time.

Q. There was no coal right in the opening, was there?

A. There was coal under the opening, yes.

(Testimony of Joe Costa.)

Q. Weren't you using the buckets, instead of the grabs?

A. We were using the buckets instead of the grabs.

[55]

Q. Didn't the buckets have wheels on the bottom to roll over to the sides of the ship? A. Yes.

Q. So as to get the loose coal up on the sides of the ship?

A. Yes, if it was necessary to go there; it is not necessary when it is in the hatch, they fill up there and haul it from there.

Q. How did Souza go down into the hatch?

A. Went down a step-ladder as they have it fastened to the ship.

Q. There is a ladder there that goes right down to the ship, is there? A. Yes.

Q. I will show you a photograph taken of the steamer "Tancred." Now, does that show the hatch down below the bucket? You are looking right down at it like that. A. This is the hatch.

Q. There is the open hatch? A. Yes.

Q. Here is the bucket in the air, coming up to the boom?

A. Yes, this tub is going up; then after it gets up here, it is supposed to come in here and dump in here.

Q. That is the correct position of where the dumpman stands? A. Yes.

Q. This is the hopper right below?

A. This is the hopper right in front of him.

Q. Where is the ladder that went down into the hatch, that Souza went down on?

(Testimony of Joe Costa.)

A. You have not got it here.

Q. But where would it be?

A. It is supposed to be placed on the after part of the hatch.

Q. Toward the stern? A. Toward the stern.

Q. It would be right in there, then (pointing)?

A. It was supposed to be right on the after part of the hatch, right straight on the bottom?

Q. Now, did you see Souza come down the ladder?

A. Yes.

Q. Where was the bucket? Had it started up when he was coming down?

A. At the time that the accident happened he was working, [56] he was taking this fellow Silva's place, while the other man was changing his shirt—he had already come down the ladder.

Q. He had already come down the ladder?

A. Yes.

Q. How long before had he come down the ladder?

A. About ten minutes before time.

Q. About ten minutes ahead of time? A. Yes.

Q. You had known that Souza acted as a hatch-tender a good many times? A. Yes.

Q. You did not see any coal falling yourself?

A. Not until it was down in the hatch.

Q. You got his yourself with some coal?

A. Yes.

Q. Stevedores' wages are now $6 a day, but at the time Mr. Souza was killed they were getting $5 a day?

A. At the time he got killed he was getting $5 a day, but now we get $6.75 a day.

(Testimony of Joe Costa.)

Q. Is it not your opinion, Mr. Costa, that a stevedore, year in and year out, puts in about two-thirds of his time working, and the other third of his time there is no work for him to do?

A. Well, there is some of them puts in two-thirds, and some about three-quarters of the time.

Q. From what you knew of Mr. Souza, and your acquaintance with him, assuming, as I understand you, his earnings are $35 a week, including overtime, wouldn't you estimate that he got in about two-thirds of the working time in a year?

A. Probably a little over.

Q. How much over? A. I couldn't exactly tell.

Q. I want to be fair with you, but didn't you so testify before W. H. Pillsbury, general referee, at room 211 of the City Hall, Oakland, California, on September 5, 1916, at 1:30 o'clock P. M., in answer to a question propounded by either the referee or one of the counsel:

"How much would it average year in and out?

A. I cannot [57] tell you exactly what, but I figure about $10 a week overtime all the year around.

"Q. For two-thirds of the year?

A. Yes, sir.

"Q. Altogether, then, you would estimate his earnings at $35 a week, including overtime, for two-thirds of the year? A. Yes, sir."

Didn't you testify that way on that occasion, Mr. Costa?

(Testimony of Joe Costa.)

A. At the time I thought you were asking me at the present time that we were working.

Q. No, I am talking as you knew Souza during your acquaintance with him.

A. You did't ask me as I knew Souza; you didn't say that at all.

Q. Isn't that the fact, that you testified that way, or do you want to change that now in any way?

A. How do you mean?

Q. Didn't you so testify, as I stated, that Mr. Souza got in only about two-thirds of the year at $35 a week, including overtime and that you would estimate that as being his earnings?

A. At that time I testified, but when you asked me this second question you did not ask me at the time that I knew Mr. Souza, so I thought that you were asking me some different thing, and I answered it different.

Q. You think, then, he got in about two-thirds of the year at $35 a week, including overtime?

A. At the time I knew him.

Q. What do you estimate Mr. Souza's earnings were, Mr. Costa?

A. My estimate of Mr. Souza's earnings is, including overtime and everything, two-thirds of the year, and probably more—what more I don't know.

Q. The hatch-tender looks out for the men, for the bucket itself coming down, for coal falling out of the bucket and coal falling out of the hopper?

A. He says, in case he sees the coal coming out of the hopper.

(Testimony of Joe Costa.)

Q. If he sees it coming? A. Yes. **[58]**

Q. His business is to look out for his men?

A. Yes.

Q. And coal does fall out of the buckets as they go up, does it not? A. Very seldom.

Q. Very seldom. A. Yes.

Q. Does it fall out of the hopper once in a while?

A. Yes.

Q. In other words, there is always danger to men down in the hatch, isn't there. A. Yes.

Q. And that is one of the reasons the hatch-tender is there watching it? A. Yes.

The COURT.—How much coal fell at this particular time?

A. I couldn't exactly tell, but it scattered all over the hatch.

Mr. HEIDELBERG.—Could you estimate it? Was it half a bucket or three-quarters of a bucket?

A. The way it came down it must have been half a bucket, and probably more.

Q. Do you suppose you would have half a bucket?

A. It scattered all over the hatch, and it must have been.

The COURT.—Is it a usual thing to have a half bucket of coal fall down from the hopper or from the bucket?

A. It came down as if the man that was dumping or the engineer didn't do it right; it is possible for whole buckets to come down sometimes.

Q. I know, but is that usual? A. No.

(Testimony of Joe Costa.)

Mr. PEART.—Q. It does happen, however, does it, Mr. Costa?

A. That a half bucket of coal comes down?

Q. Yes. A. No.

Q. You never saw that happen? A. No.

Q. Didn't you just say a minute ago you have seen a whole bucket come down?

A. I said that as it came down it looked as if it was half a bucket or more that came down.

Q. How many times have you seen coal drop down?

Mr. HEIDELBERG.—I ask that that question be more specific. **[59]** A. That I couldn't tell.

Mr. PEART.—Q. After or before the accident—it don't make any difference.

Mr. HEIDELBERG.—I object to the question.

The COURT.—The objection is overruled.

A. Well, I have seen it sometimes, and sometimes I have seen nothing.

Mr. PEART.—Q. This was very big coal, was it not? A. Yes.

Q. Lumps about how big? A. All sizes.

Q. Mostly big lumps, weren't they, however?

A. Yes, mostly big lumps.

Q. You never acted as a dump man yourself, did you? A. A good many times, yes.

Q. Just what does the dump man do?

A. The one that stands there, he takes the bucket into the place where he wants to dump it and makes sure that he has got it in so as not to go down on the hatch and hurt the men.

(Testimony of Joe Costa.)

Q. Did you ever have any spill on you? A. No.

Q. Mr. Nelson was switching cars around the yard, was he?

A. That I couldn't tell you, what he was doing.

Q. You don't know what he was doing?

A. At the time he was dumping.

Q. You don't know whether or not he was a switchman in the yard, handling electric cars?

A. That I don't know.

Q. As I understand you, Mr. Souza was a very smart man? A. He was, yes.

Redirect Examination.

Mr. HEIDELBERG.—Q. Was that the last bucket that you were to send up on your shift?

A. Yes.

Q. You were just quitting work at that time?

A. Yes.

Q. Did you consider it was time for you to quit work at that time? **[60]** A. Yes.

Q. What is the custom of stevedores when they are working coal, as to going down into the hold a few minutes early?

A. That is when they want to go down to change their clothes, so as to be ready to go to work on time.

Q. What time, for the sake of repetition—what time did you say that this accident actually happened?

The COURT.—Why for the sake of repetition?

A. At twelve o'clock sharp.

Mr. HEIDELBERG.—Q. Now, what are the highest wages you heard of stevedores making, working

(Testimony of Joe Costa.)

overtime; just give us the figures.

The COURT.—You mean since this occurrence, or at the time?

Mr. HEIDELBERG.—About the time of this accident, and previous to that time, what were some of the wages you had heard of stevedores making working overtime and Sundays?

A. At the time Mr. Souza got hurt?

Q. Yes, or a little previous to that.

A. $35 a week.

Q. Around about $35 a week. A. Yes.

Q. Those men who looked for work were making $35 a week: Is that right? A. Yes.

Testimony of Manuel Reposa, for Libelant.

MANUEL REPOSA, called for the libelant, sworn.

Mr. HEIDELBERG.—Q. Where do you live?

A. 23d Avenue, East Oakland.

Q. On August 5, 1916, were you at work as a stevedore in the steamer "Tancrid" for the Western Fuel Company? A. Yes.

Q. Did you know Manuel Souza?

A. I knew him since he worked on the boat that I was on.

Q. What time did you go to work that morning?

A. Seven o'clock.

Q. When were you to take lunch?

A. Twelve o'clock. **[61]**

Q. Was Mr. Souza on your shift?

(Testimony of Manuel Reposa.)

A. Yes, he was on that side, and I was on this side.

Q. You say you were going to lunch at twelve o'clock? A. Yes.

Q. Was Manuel Souza to go to lunch at twelve o'clock?

A. He was working on the other side; he was supposed to go and work and take the other fellow's place—he went at eleven o'clock.

Q. In other words, the shifts changed there?

A. They had to change there; he had to take the other fellow's place.

Q. At the time of this accident, where were you standing?

A. I was down in the hold right this side of him.

Q. What were you doing, were you quitting, or were you going to work?

A. I was waiting there to go up and have dinner.

Q. Waiting to go up and have your lunch?

A. Yes.

Q. Were you looking upward? A. Yes.

Q. You saw these buckets go up? A. Yes.

Q. What bucket was that that went up?

A. It was a bucket all full of big lumps, all filled by hand.

Q. But was it a bucket that was sent up by the shift that was just quitting? A. Yes.

Q. Did you follow this bucket in its ascent and course?

A. Yes, I followed it; I was looking up all the time to see if it went to the hopper.

(Testimony of Manuel Reposa.)

Q. You saw the bucket go up to the top?

A. Yes.

Q. Will you please tell what you saw then?

A. I saw the bucket when it goes halfway in, and when the fellow pulls out the hook, half goes in and half goes out.

Q. How far did this bucket go into the hopper before it was dumped?

A. It went about four feet in.

Q. How far did this bucket go in?

A. It is supposed to go *in more in it.*

Q. How far is the bucket supposed to go in?

A. It is supposed **[62]** to go—I don't know the size of the hopper on top, I never have been up there.

Q. But in your opinion: You have watched this a number of times, haven't you? A. Yes.

Q. How far do you say a bucket goes in before it is supposed to be dumped?

Mr. PEART.—Objected to as immaterial, irrelevant and incompetent, no proper foundation laid for the question.

The COURT.—Objection overruled.

Mr. HEIDELBERG.—Q. How long were you a stevedore previous to this accident?

A. I worked about three months.

Q. Had you often watched this bucket being dumped? A. Yes.

Q. You became very familiar with the way the bucket was dumped, as far as you could see?

A. Yes.

(Testimony of Manuel Reposa.)

Q. How far do you say that this bucket generally goes in?

Mr. PEART.—The same objection.

The COURT.—Overruled.

Mr. HEIDELBERG.—Q. How far did this bucket go in when it was dumped?

A. About four feet it went in; I couldn't tell you exactly, because I never was up there; I was down in the hold and was looking up.

Q. To the best of your knowledge, what happened when the bucket went in?

A. The bucket goes halfway and then it turns back.

Q. Started back?

A. And then dumped all the coal right down.

Q. Dumped the coal down where?

A. Down in the hold, where we were working; the bucket is supposed to go way in and dump it right in.

Q. This bucket did not go way in?

A. That is right.

Q. Do you know Manuel Souza?

A. I know Souza since he was working with me on the coal.

Q. What kind of a man was he, a hard-working man?

A. I couldn't **[63]** tell you exactly; he was a good man since I worked with him.

Q. What warning was yelled, if any, by anyone, if you know?

Mr. PEART.—I object to that as immaterial, irrelevant and incompetent.

(Testimony of Manuel Reposa.)

Mr. HEIDELBERG.—Q. Did you see this coal coming down? A. Yes.

Q. Did you give any warning A. Yes.

Q. What did you say?

A. I said, "Look out."

Q. Then what did you do?

A. I ran myself, right between the buckets.

Q. Where was Manuel Souza at that time?

A. Manuel Souza was on that side, on the other side of me.

Q. Do you know about what time this was that this coal came down? A. I couldn't tell exactly.

Q. Do you know what time?

A. The whistle was blowing already when the coal hit him on the head.

Q. You say all the crew were just shifting at that time? A. Yes.

Cross-examination.

Mr. PEART.—Q. Mr. Souza did not belong to your gang, did he? A. How do you mean?

Q. Was Souza in your crew, your shift?

A. Yes, he was in my shift.

Q. Souza was not in your gang? A. No.

Q. You were in Costa's gang? A. Yes.

Q. Souza was in Frank Duarte's gang?

A. Yes.

Q. Costa's gang was working on Hatch No. 2 between 11 and 12 o'clock on that day, was he?

A. Yes.

Q. And Souza belonged to Duarte's gang and Duarte's gang was going to work at twelve o'clock?

(Testimony of Manuel Reposa.)

A. Yes.

Q. Why was Souza down there?

A. Souza was down there to take the other fellow's job. **[64]**

Q. That is, Silva's? A. Yes.

Q. He wanted to let Silva go to lunch?

A. Yes.

Q. Did Silva call out to him and ask him to come and take his place?

A. No, he didn't call; he just was going down.

Q. He went to work after the whistle was blown?

A. The whistle was blowing already.

Q. Twelve o'clock noon?

A. Twelve o'clock the whistle was blowing.

Q. He went down and began work?

A. He didn't work right away, because he had to take his shirt off, and when the tub comes up then he starts to work.

Q. Costa's gang were all in there, weren't they?

A. Yes, Costa's gang were all in there.

Q. None of Duarte's gang were in there but Souza?

A. There were some coming down on the ladder.

Q. But nobody but Souza was down there?

A. Yes.

Q. He was the only one that was down there?

A. Yes.

Q. You were going up the steps?

A. No, I was not going up. I was right by my car.

Q. Costa's gang had not gone up the ladder yet?

(Testimony of Manuel Reposa.)

A. No.

Q. When you change gangs, don't everybody change at the same time?

A. You can't tell what time you are going to change.

Q. When they change the gangs, don't your engineman, and dumpman, and the hatch-tender, and the stevedores all change together?

A. Sure, they have to change.

Q. They all change together, don't they?

A. They change if they have got men enough to change.

Q. When you were coming up the ladder you saw this bucket dump half in and half out? A. Yes.

The COURT.—He did not say when coming up the ladder. He said down below. **[65]**

A. I was right down there. I misunderstood him.

Mr. PEART.—Q. You had not started up the ladder yet? A. No.

Q. You were standing down in the hold?

A. I was standing in the hold.

Q. You saw the bucket go up, watched it?

A. I watched the bucket go up.

Q. You saw it dump half in the hopper and half out of the hopper? A. Yes.

Q. Did you see the dumpman at all?

A. I saw the man, yes.

Q. Did you see him do anything to the bucket?

A. I saw him pull the rope and dump half in and half out.

Q. You saw him pull the rope? A. Yes.

(Testimony of Manuel Reposa.)

Q. And dump half in and half out? A. Yes.

Q. How big is that hopper?

A. I couldn't tell you, because I have never been up there.

Q. Do you know where the dumpman stands

A. Yes.

Q. Does that picture show where he stands?

A. There is the dumpman.

Q. Can you see him there? You are looking down on the boat here.

A. I can't tell exactly whether that is the right man or not.

Q. Right there, is that where the dumpman stands? A. Yes.

Q. That is where he stands?

A. This bucket is supposed to go way inside there, and the bucket, when it goes over there, the engineer is supposed to pull it all the way in, and no coal comes down; but he dumped when it was half way in.

Q. Where was the dumpman standing?

A. The dumpman was right here.

Q. Right where this man is?

A. I don't know who that man is there.

Q. But in the same place where that man is?

A. He couldn't **[66]** be there, because if he goes over there he might fall overboard; he is supposed to be more inside.

Q. He is supposed to be more inside than that?

A. Yes.

Q. Now, from where you were in the hold, you could see the dumpman dump the bucket?

(Testimony of Manuel Reposa.)

A. Yes, because I was on the outshore.

Q. You were on the outside part of the hold?

A. No, I was on this side, outshore.

Q. Furthest away from the bunkers?

A. No; right between my bucket and between the other fellow's bucket, too.

Q. You were in the hold?

A. I was in the hold.

Q. You could see the dumpman dump this bucket?

A. Yes.

The COURT.—What are the dimensions of the hatch?

Mr. PEART.—I think about 30 feet; I am not positive.

Mr. HEIDELBERG.—15 by 30, I think.

Mr. PEART.—Q. You only have been working as stevedore about three months?

A. That is all.

Redirect Examination.

Mr. HEIDELBERG.—Q. Do you know where Mr. Mendoza was at that time?

A. Mr. Mendoza was by the step.

Q. On what shift, what gang was Mendoza?

A. Frank Duarte's.

Q. He was on Frank Duarte's gang? A. Yes.

Q. He was on the same gang that Souza was, then?

A. Yes.

Q. What gang was Mr. Lima on?

A. Frank Duarte's gang.

Q. You say Lima was on Frank Duarte's gang?

A. Yes.

(Testimony of Manuel Reposa.)

Q. Where were these men at the time?

A. I couldn't tell you exactly, because I didn't see them. I know Mendoza was by the steps.

Q. Downstairs or upstairs? A. Downstairs.

Q. He was down in the hold?

A. He was in the hold.

Q. What do you know about the custom of stevedores when they are working coal as to when they go down to work? [67]

A. I can't tell that, because I was not working very long on that job.

Testimony of August Silva, for Libelant.

AUGUST SILVA, called for the libelant, sworn.

Mr. HEIDELBERG.—Q. Where do you live, Mr. Silva?

A. Oakland, 1150 Eighty-second Avenue.

Q. What is your business? A. Stevedore.

Q. How long have you been stevedore?

A. Off and on, about 18 years.

Q. Were you working on the steamer "Tancrid" for the Western Fuel Company on the day Mr. Souza met his death? A. Yes.

Q. What time did you go to work in the morning?

A. Seven o'clock.

Q. What time were you supposed to go to lunch?

A. Twelve.

Q. Do you know what shift Mr. Souza was on?

A. I understand Mr. Souza was supposed to go to lunch at 11 o'clock.

Q. What time did you quit work for lunch?

(Testimony of August Silva.)

Mr. PEART.—I move to strike out what Mr. Souza was supposed to do.

Mr. HEIDELBERG.—We will agree to that.

Q. What time did you go to lunch that day?

A. I was supposed to go to lunch at 12 o'clock.

Q. What time did you go to lunch?

A. In fact, I didn't have no lunch at all that day.

Q. I know, but when this accident happened, who relieved you that day? A. Mr. Duarte's gang.

Q. Mr. Duarte?

A. Frank Duarte's gang relieved us.

Q. Who in particular relieved you that day?

A. I think Mr. Mendoza was the one to relieve me.

Q. Do you know who Mr. Mendoza's partner was?

A. Manuel Souza.

Q. Had you quit when this accident happened?

A. When this accident happened I was going back to the wing to get [68] my coat and quit; I sent the last tub up.

Q. How long before the accident happened had you quit work, just as near as you can figure it, half a minute, or two minutes?

A. I guess about half a minute. Just time for the tub to go up and come down.

Q. Did you see the bucket go up?

A. No, I didn't see it, I had gone into the wing to get my clothes, to go off.

Q. What do you know about the custom of stevedores, when they are working coal, as to going down into the hold?

(Testimony of August Silva.)

Mr. PEART.—I object to that as immaterial, irrelevant and incompetent.

The COURT.—It seems to me if a man is going to be relieved at twelve o'clock the other man has got to be there at 12 o'clock.

Mr. HEIDELBERG.—We want to show that there is a well-recognized custom of which the Western Fuel Company must have been aware that the men went down in the hold a minute or two before, in order to change their clothes.

The COURT.—The objection is overruled.

Mr. HEIDELBERG.—Q. What clothes do you use in working coal?

A. What we call a soft shirt.

Q. Do you have to do any changing before you go out to lunch? A. Yes.

Q. And after you come back from lunch?

A. We would have to change after we came back again.

Q. Where was Mendoza at that time?

A. Mendoza was near the ladder.

Q. In the hold? A. In the hold.

Q. Do you know Mr. Lima? A. Yes.

Q. Where was he at that time?

A. That I don't know.

Q. Where was Mr. Fernandez at that time?

A. I don't know; I was down in the hold. [69]

The COURT.—You don't know how many of Duarte's gang had got in there?

A. I know for sure there were two; there was Mr. Mendoza and this man Souza, sure.

(Testimony of August Silva.)

Q. Two or three?

A. Two or three I know for sure.

Mr. HEIDELBERG.—Q. You did not see this bucket dumped from where you were?

A. No.

Q. Did you see the coal coming down?

A. Well, I saw them all run; as a rule, when a man starts to run they all run, and I rang in the wing, and the coal came down.

Q. Did you hear any warning prior to that?

A. If there was any warning, I was excited, I never noticed it.

Q. What did you do when this coal came down—afterwards? Did you see Mr. Souza?

A. I ran over to the pile there and seen Mr. Souza laying there; he was dead. I put my hand on his head and tried to stop the circulation of the blood running, and his brains and blood was running out through my fingers.

Q. Then what did you do?

A. I hollered to the men down there, I said, "Boys, give me a hand to get him out of the hold."

Q. Then what did you do?

A. I went in the tub and Mr. Costa helped me, and we took him out of the hold.

Q. You took him up in a bucket? A. Yes.

The COURT.—I suppose he was killed by that coal. No doubt about that.

Mr. HEIDELBERG.—Q. How long have you worked as a stevedore?

A. I guess about 18 years, off and on.

(Testimony of August Silva.)

Q. In your experience, did you ever notice much coal to be thrown back into the hold of a vessel before that time? A. No.

Q. Never knew of it? A. No.

Q. What was the custom of stevedores after a bucket goes into the hopper?

A. After the bucket they goes up in the air they leave it up to the hatch-tender to look after it, and as a [70] rule they go on and fix up the pile for the next tub to come down and get the coal in.

Q. Is that what Souza was doing at the time?

A. That is what Mr. Souza was doing at the time.

Q. You don't know whether it was Mendoza or Mr. Silva that relieved you?

A. They generally relieve the right-hand man and left-hand man; on the right hand, Mr. Mendoza is supposed to have relieved me, as I was the right-hand man, and Mr. Souza was supposed to have relieved my partner.

Q. Those two men were to relieve you?

A. Those two men were to relieve us.

Q. And they were both down in the hold at the same time? A. They were both in the hold.

Cross-examination.

Mr. PEART.—Q. How are you paid as a stevedore?

A. During the time of Mr. Souza?

Q. No; how do you get your pay as a stevedore. By the hour, is it not?

Mr. BRADLEY.—I object to that as not proper cross-examination.

(Testimony of August Silva.)

Mr. PEART.—Q. You get paid by the hour, don't you? A. Yes.

Q. Once in awhile you boys help each other out, if you have got any particular errand to do, by taking the other man's place for a few minutes before the shift changes? A. Yes.

Q. Souza came down there to take Frank Silva's place, or was it yours?

A. Silva's—Gus Silva's.

Q. He came down there a little ahead of time to take Gus Silva's place, didn't he? A. Yes.

Q. Gus would get paid by the hour, wouldn't he?

A. Naturally he would.

Q. From 11 to 12 Gus would get the money?

A. Yes.

Q. But Souza, as a matter of kindness, took his place for the [71] last minute or two?

A. In the last minute, to give him a chance to get his clothes on.

The COURT.—Do I understand it is your contention that while they might not have the right to kill Gus Silva they would have the right to kill Souza for taking his place?

Mr. PEART.—No, I do not intend to make that contention, but later on its materiality will appear more clearly.

Q. Have you ever noticed coal falling from buckets when they went up? A. Yes.

Q. In you eighteen years' experience? A. Yes.

Q. It is rather a common thing, isn't it?

A. Well, it is pretty common.

(Testimony of August Silva.)

Q. Pretty common? A. Yes.

Q. You never saw as much coal as that fall?

A. Not at one time, no.

Q. Have you seen coal pretty nearly as much as that fall?

A. I have seen a lump of coal come down; yes.

Q. You have seen two or three lumps come down at a time, haven't you? A. Yes.

Q. And falling coal is always dangerous, isn't it?

A. Yes, I suppose so.

Q. If you got hit on the head with any of that you saw fall, you would be killed, wouldn't you?

A. Some of it would kill you and some would not.

Q. In other words, when you are working there in the open hatch, if any of the coal falling would hit you it would be a bad injury and it might kill you?

A. Yes.

Q. It is something you have go to watch every minute, is it not?

A. The workingmen aren't supposed to watch, it is up to the hatch-tender.

Q. The hatch-tender is supposed to watch?

A. Yes. **[72]**

Q. You men that are working there, with your lives dependent on it, depend on the hatch-tender's warning, don't you?

A. Yes, the hatch-tender's warning.

Q. Do you know that Souza was the hatch-tender himself for quite awhile?

A. I worked for Souza myself.

(Testimony of August Silva.)

Q. You worked under him while he was hatch-tender? A. Yes.

Q. How many times? A. Quite a few times.

Q. Did you see Costa downstairs there with the rest of your crew? A. Costa was downstairs.

Q. What was he doing down there?

A. He was standing up, as far as I know.

Q. Does the hatch-tender stand down below sometimes, as well as up on deck?

A. They take their chances on that; sometimes they like to be down there, and sometimes like to be up above; sometimes they go down and help bring the tubs out.

Q. Was he helping you with the tubs? A. No.

Q. He was just standing there, performing his duty down below? A. Yes.

Q. I want to show you a picture of the "Tancrid." Does that look like the "Tancrid" there? A. Yes.

Q. There is the bucket up in the air? A. Yes.

Q. The hopper is up in here? A. Yes.

Q. And the open hatch down here? A. Yes.

Q. Now, I will show you another photograph; that is the "Tancrid" lying here? A. Yes.

Q. There is the bucket in the air and there is the boom? A. Yes.

Q. Is that a good representation of the hopper?

A. Yes.

Q. Is that where the man stands that dumps buckets, where that man is standing?

A. Yes, where he stands, usually.

(Testimony of August Silva.)

Q. About how far in is that man from the edge of the hopper?

A. It is up to the man; sometimes they go right to the edge, and [73] sometimes they go inside about four or five feet, inside of the hopper.

Q. Do you know how wide that hopper is, as a matter of fact. A. No.

Q. From the bunkers up? A. No.

Q. You know it is about 15 feet?

A. I would not say. I offer that in evidence.

Q. Was there coal right in the hatch, or were the men picking it up out in the wings?

A. The coal was in the hatch.

Q. There was coal there to be handled in the hatch?

A. There was coal in the hatch to be taken out.

Redirect Examination.

Mr. HEIDELBERG.—Q. Did you request Mr. Souza to relieve you at this time? A. No.

Q. You have already stated you were relieved either by Mr. Souza or Mr. Mendoza?

A. Mr. Souza relieved my partner, Gus Silva; his name is Gus Silva, too; he relieved him, and I was waiting to bring my tub up, to get my coat to go to lunch, so I waited until they hooked on my tub and sent it up in the air.

Q. When does your overtime, if at any time, start?

A. After five o'clock.

Q. After you are supposed to be through work?

A. Yes.

Q. If the bucket had gone into the hopper and had

(Testimony of August Silva.)

been properly dumped, do you consider that there is any danger of falling coal after that time?

A. No, not if properly dumped.

Testimony of Joe Mendoza, for Libelant.

JOE MENDOZA, called for the libelant, sworn.

Mr. HEIDELBERG.—Q. Where do you live?

A. 537 Filbert St., Oakland.

Q. What is your business?

A. Stevedore. [74]

Q. Were you at work on the steamer "Tanerid" for the Western Fuel Company on August 5, 1916?

A. Yes.

Q. Did you know Manuel Souza? A. Yes.

Q. Who was your partner on that day?

A. Manuel Souza.

Q. What time were you supposed to go to lunch?

A. At 12 o'clock.

Q. At 12 o'clock.

A. We were supposed to go to lunch at 12, but we went to lunch at eleven.

Q. You were down in the hold at the time of this accident, were you? A. Yes.

Q. Who else was down there of your gang, if you know?

A. Well, I couldn't remember now who was there.

Q. Do you know Mr. Lima?

A. I know Mr. Lima.

Q. Was Mr. Lima there?

A. Mr. Lima was there.

Q. Did he belong to Frank Duarte's gang?

(Testimony of Joe Mendoza.)

A. I don't think so; I can't remember, it is so long; I can't remember who was down there.

Q. But you were there? A. Yes.

Q. You had gone to work when this accident happened? A. Yes.

Q. Did you see this bucket go up?

A. I did see it go up.

Q. Did you see it after that? A. No.

Q. Did you hear anyone cry any warning?

A. I did.

Q. What did you do? A. I run.

Q. What, if anything, happened to you?

A. It broke my leg.

Q. You didn't see the way this bucket was dumped? A. No.

Q. What time was it that the accident happened?

A. Just about twelve o'clock.

Cross-examination.

Mr. PEART.—Q. Had you gone to relieve somebody, Mr. Mendoza? A. Yes.

Q. Who was the man that you relieved?

A. I was supposed to relieve Mr. Silva.

Q. The man who has just testified?

A. Yes. [75]

Q. You were on your way down?

A. No, I was down in the hold.

Q. You were down in the hold? A. Yes.

Q. Do you know whether, when gangs are changed, the engineer, the dumpman, the hatch-tender and the crew all change together?

A. They are all supposed to.

(Testimony of Joe Mendoza.)

Q. They are all supposed to change together?

A. They are supposed to change when the whistle blows at 12—they are supposed to be relieved and they are supposed to all change.

Q. In other words, the dumpman, the engineer and the crew are all a part of one gang? A. Yes.

Q. You had gone down, and Souza had gone down ahead of twelve o'clock? A. Yes.

Q. Do you know anything about whether it is common or otherwise for coal to fall out of the bucket?

A. No.

Q. Does coal commonly fall out of the bucket, does it happen often? A. No, once in a great while.

Q. That is a part of the hatch-tender's job, to keep you advised as to that? A. Yes.

Q. So as to look out for it? A. Yes.

Q. That falling coal is dangerous, when it falls out?

A. Sometimes it is dangerous; if you are in the way; if you are out of the way it ain't dangerous.

Q. If it hit you it would be dangerous?

A. Certainly.

Q. These were big lumps? A. Yes.

Redirect Examination.

Mr. HEIDELBERG.—Q. When this bucket goes into the hopper, how is it as to falling coal?

The COURT.—Does coal usually fall after the bucket has got into the hopper?

Mr. HEIDELBERG.—Q. Does the coal fall out of the bucket [76] after it has gone into the hopper?

A. Sometimes it happens.

(Testimony of Joe Mendoza.)

Q. Did you ever see any amount of coal like this fall out of a hopper before? A. Not in my life.

Q. Never in your life before? A. No.

Q. Did this coal seem, in your opinion, to fall quickly?

Mr. PEART.—I object to that.

Mr. HEIDELBERG.—I will withdraw that.

Mr. PEART.—Q. You never have seen as much coal as that fall out of the hopper, but you have seen coal fall out of the hopper?

A Well, once in awhile a lump or so.

Q. Come down out of the hopper? A. Yes.

Mr. HEIDELBERG.—Q. How much coal do you suppose fell this time, if you know?

A. I couldn't say.

Testimony of Antone Lima, for Libelant.

ANTONE LIMA, called for the libelant, sworn.

Mr. HEIDELBERG.—Q. What was your business on August 5, 1916, the date of this accident?

A. I can't talk English.

Q. Do the best you can. Did you know Manuel Souza? A. I know him for awhile.

Q. You knew him the day he was killed?

A. I knew him when he was killed.

Q. Where were you working at that time?

A. I worked in Frank Duarte's gang.

Q. On the steamer "Tanerid"?

A. "Tanerid," yes.

Q. Where were you at the time of this accident?

A. I was alongside of the ladder; you see I just

(Testimony of Antone Lima.)

began shoveling to fill my tub.

Q. You just started to fill your tub, to go on the work? A. Yes.

Q. Were you on the same gang as Mr. Souza?

A. Yes.

Q. And Mr. Mendoza? A. Yes. [77]

Q. You were down in the hold of the ship?

A. Yes.

Q. Did you see this bucket go up in the air?

A. No, I didn't see it.

Q. Did you hear any warning, anybody yell out?

A. Yes, I heard somebody holler, and I ran away.

Q. Did you see the coal coming down?

A. No, I never looked at it.

Q. Do you know what time it was this accident happened? A. Just as the whistle blowed.

Cross-examination.

Mr. PEART.—Q. Were you going down to relieve some friend? Did you take somebody else's place?

A. Yes.

Q. The other man got the money for that 11 o'clock to 12? A. Yes.

Q. You got paid by the hour, didn't you?

A. Yes.

Q. You didn't get any pay for working before 12 o'clock? A. No.

Q. Mr. Costa's gang was still there? Mr. Costa was in charge of it, was he not?

A. Mr. Costa is quitting at that time.

Q. He was just quitting? A. Yes.

(Testimony of Antone Lima.)

Q. But this was the last bucket on his shift, was it not? A. Yes.

Q. Mr. Duarte was the hatch-tender when the coal fell? A. Yes.

Q. Mr. Duarte did not tell you to go to work?

A. Yes—the whistle had blown.

Q. The whistle had not blown?

A. It had blown.

Q. But Mr. Costa's gang was still there?

A. Yes, was still there, because they didn't get no chance to go up yet; they waited for a chance to go up.

Testimony of Frank Duarte, for Libelant.

FRANK DUARTE, called for the libelant, sworn.

Mr. BRADLEY.—Q. What is your business?

A. My business?

Q. Your occupation?

A. Rigger and stevedore. [78]

Q. How long have you been a stevedore?

A. About 15 years.

Q. Have you worked the greater part of the time in coal? A. I was working over here in Oakland.

Q. On coal? A. On coal, yes.

Q. What was your occupation on the 5th of August, 1916, at the time Manuel Souza lost his life?

A. I was running a gang of stevedores.

Q. Were you hatch-tender? A. Yes.

Q. What was the hour that the gang that you were in charge of was to go to work?

A. The hour was from 11 to 12.

(Testimony of Frank Duarte.)

Q. Now, at what time was it that this man lost his life, Souza? A. Manuel?

Q. Yes. A. Well, it was about near 12.

Q. Did he belong to your crew? A. Yes.

Q. Was your crew just going to work at that time?

A. Just was ready to go to work.

Q. They were shifting crews? A. Yes.

Q. Was the whistle blowing, or had it blown?

A. Well, at the time Manuel got killed, it was just getting 12 o'clock, the whistle blowing.

Q. Where was Costa, the man who had charge of the crew before you?

A. He was down in the hold with his gang.

Q. How many men were in your crew?

A. Mine?

Q. Yes. A. There were nine with me.

Q. How many of those men in your crew had gotten down into the hold?

A. Well, the men that were down below in the holds were about six men, I think, because I had two on deck yet with me.

Q. Who were up on the deck?

A. I was on the deck yet.

Q. Six had gone down?

A. Six was down, I think.

Q. Did you see this bucket of coal come up, the one that came [79] back and dumped the coal on Souza? A. Yes, I saw it.

Q. Did you see it after it reached the cross-piece, and did you see it go over into the bunker?

A. Yes, it went right into the bunker.

(Testimony of Frank Duarte.)

Q. Did it go out quickly or slowly?

A. Well, at the time I watched it I saw the bucket went in, and at the same time she swung a little bit outside and the coal came down a little bit.

Q. It came back spilling coal?

A. Yes, it spilled coal coming out.

Q. Did you notice how far it went into the hopper?

A. When I saw it, it was away in already.

Q. Then it came right out dumping coal?

A. Yes, because the coal came down.

Q. How far were you from the hatch?

A. I was close to the hatch.

Q. Did you give any warning?

A. No; I was watching myself, too.

Q. In your experience as a stevedore and hatch-tender, how long have you been a stevedore and hatch-tender?

A. Well, this last time I am about a year and a half, I think.

Q. How long have you been stevedore?

A. About 15 years.

Q. Have you seen coal fall out of a bucket after it has gone into the hopper and was properly dumped?

A. I see sometimes, once in awhile.

Q. After it has been dumped? A. Yes.

Q. As a hatch-tender, do you watch the bucket after it is dumped, or as it goes up?

A. We have to watch it when it goes up.

Q. After it gets up and gets over to the bunker, then you do not watch any more, or do you?

(Testimony of Frank Duarte.)

A. We are supposed to watch.

Q. What for?

A. There might some lumps come down.

Q. From where? A. From the hopper.

Q. From the hopper? A. Yes.

Q. But not from the bucket?

A. And from the bucket, too. [30]

Q. How often have you seen that happen?

A. How long?

Q. How often? A. Pretty nearly all the time.

Q. That the coal falls out of a bucket after it has been dumped?

A. Well, sometimes, but not every time.

Cross-examination.

Mr. PEART.—Q. When a gang is changing, Mr. Duarte, they change clothes, don't they? They go down and change their clothes before they go to work?

A. Yes, they go down in the hold and change clothes.

Q. They always go down a little ahead of time to change their clothes?

A. They do most of the time that way.

Q. Then you had not taken charge of the gang yet?

A. No, not yet.

Q. Costa was still in charge? A. His own gang.

Q. Your crew was ready to go to work, or getting ready?

A. They were getting ready to go to work.

Q. You have been 15 years a stevedore?

A. Yes.

(Testimony of Frank Duarte.)

Redirect Examination.

Mr. BRADLEY.—Q. You say you watched this bucket as it went up, the one that spilled the coal on Souza? A. Yes.

Mr. PEART.—I object to that as not redirect examination.

The COURT.—Objection overruled.

Mr. BRADLEY.—Did any coal fall out of that bucket as it went up? A. No.

Testimony of J. Swartz, for Libelant.

J. SWARTZ, called for the libelant, sworn.

Mr. HEIDELBERG.—Q. What is your business, what do you do for a living?

A. I am a longshoreman.

Q. Did you know Manuel Souza?

A. Yes, I knew him.

Q. Where were you working with Manuel Souza the day he was killed? A. Yes. [81]

Q. Where were you? A. I was up on the deck.

Q. What were you doing up on the deck?

A. I was watching for a chance to go down.

Q. Did you see this bucket that went up in the air?

A. I saw it going up.

Q. Did you see it when it got up to the top?

A. I don't know; I couldn't see it.

Q. You saw it after it got up to the top and before it went over to the hopper? A. No.

Q. You saw it go over into the hopper? A. No.

Q. I say, did you see it go over?

A. I saw it go over.

(Testimony of J. Swartz.)

Q. Then what happened?

A. Well, I don't know; that is none of my business.

Q. This bucket went in there? A. Yes.

Q. Did it stay in there, or did it come right back?

A. It came right back.

Q. It came right back?

A. I think so, because the coal fell down.

Q. What happened when the bucket came back right away. Was there any coal in this bucket when it came back? A. Surely there was coal.

Q. What did that coal do?

A. Well, the coal, it killed that man down there.

Q. It spilled down in the hold? A. Yes.

Cross-examination.

Mr. PEART.—Q. I think you said, Mr. Swartz, that you did not watch it because it was not your business? A. Yes.

Q. You did not watch the bucket go up?

A. I was watching myself. That is my business.

Q. You did not watch the bucket go over into the hopper? You just knew that some coal fell down; that is all? [82]

A. I just looked out for me; somebody hollered.

Q. Somebody hollered, and you saw some coal?

A. I run away.

Q. Then you ran away when somebody hollered?

A. Yes.

Q. You did not watch the bucket? A. No.

Q. Did the bucket go over into the hopper?

A. I suppose so.

(Testimony of J. Swartz.)

Q. That is what you suppose, because the coal came down? A. Yes.

Q. But you did not see it yourself?

A. No, I did not see it.

Testimony of Harold Nelson, for Libelant.

HAROLD NELSON, called for the libelant, sworn.

Mr. HEIDELBERG.—Q. For whom do you work at the present time—where do you live?

A. 605 Washington street, Oakland.

Q. For whom do you work?

A. Right now I ain't been working for ten months.

Q. You have not been working for ten months?

A. No.

Q. Haven't you been working the last ten months as watchman for the Western Fuel Company?

A. I was watchman at night.

Q. For the Western Fuel Company? A. Yes.

Q. You know the date that this man Souza was killed, do you not—you remember that accident?

A. Yes.

Q. And previous to that date, what had been your occupation? A. I was working upstairs with coal.

Q. For the Western Fuel Company?

A. For the Western Fuel Company.

Q. Of what did your duties consist?

A. Watching the trams.

Q. You had never, previous to the date of this accident, ever dumped any of this coal upstairs?

A. No.

(Testimony of Harold Nelson.)

Q. Who told you to go up there and dump coal on August 5th? A. Mr. Vincent.

Q. Mr. Vincent asked you as to whether you could do this work?

Mr. PEART.—I object to that. There is no charge here that [83] the Western Fuel Company was at all negligent in the selection of this man.

The COURT.—The objection is overruled.

Mr. HEIDELBERG.—Q. Did Mr. Vincent ask you whether or not you had ever dumped any of these buckets before?

A. No, he did not ask me.

Mr. PEART.—I object to that as immaterial, irrelevant and incompetent and take an exception.

Mr. HEIDELBERG.—Q. Did he ever ask you if you could dump these buckets?

Mr. PEART.—Same objection.

A. Yes.

Mr. HEIDELBERG.—Q. Did he give you any instructions, or show you how to dump these buckets?

Mr. PEART.—Same objection.

A. No.

Cross-examination.

Mr. PEART.—Q. Mr. Nelson, will you just describe the process of dumping a bucket, to the Court.

Mr. HEIDELBERG.—I submit that is not cross-examination; if they want to make this man their witness they are perfectly at liberty to do it, and we will cross-examine him.

The COURT.—The objection is overruled. I would like to find out.

(Testimony of Harold Nelson.)

A. Well, you start in with the hopper, when the tub comes in—when the tub is in the hopper there is a clutch there that you handle, you open that and dump it out.

Mr. PEART.—All you have got to do is turn a clutch?

Q. When the tub is in proper position?

A. Yes.

Q. Was this tub over the hopper at the time you dumped it? A. Over the hopper, yes.

Q. I will show you this photograph, and I will ask you whether [84] that correctly shows the "Tancrid," and the hatch, and the bucket of coal coming up, and the hopper, and there you see the figure of a man. A. Yes.

Q. Is that a picture of yourself, Mr. Nelson?

A. No.

Q. Is that a man?

A. It don't look like me.

Q. The dumpman stands in that corner where this man is standing?

A. It is changed now to another corner. When I dumped the tub it was in that corner.

Q. It was in that corner when you dumped?

A. Yes.

Q. When the bucket swings in over the hopper, you dump that, do you? A. Yes.

Q. By pulling the clutch?

A. Yes, a big clutch that comes out like that.

Q. Did you dump the tub in any particular direction when you dumped it?

(Testimony of Harold Nelson.)

A. You dump it in that way (pointing).

Q. You were employed as a switchman before you went up and dumped the tub on this particular day?

A. Yes.

Q. A switchman in handling electric cars around the yard there, Mr. Nelson? A. Yes.

Q. What experience have you had as a mechanic?

A. I never had any experience.

Q. What other duties had you performed around cars or machinery besides switchman?

A. I had not done any other thing.

Q. Around the yard there you handled the cars, the tram cars for the Western Fuel Company with coal in them? A. No.

Q. What did you do? I thought you said that you handled the cars?

A. There are two men to each train; one is running the engine and the other is loading and switching.

Q. How wide is that hopper across this way, that is, running lengthwise with the ship?

A. Ten feet, I should say. [85]

Q. What kind of a handle is that under the bucket, or what kind of a clutch is it that you catch hold of to dump? A. It must be about that long.

Q. That is, 6 or 8 inches long? A. Yes.

Q. What do you do? Just move that to the right, or to the left? A. You pull it.

Q. That is all you have got to do?

A. That is all you have got to do.

Q. When you pull it the bucket opens and dumps.

A. It dumps.

(Testimony of Harold Nelson.)

Q. It dumps. Do buckets coming along that boom there come right in the same position every time, when they swing in? A. Yes.

Q. They always go right in the same place?

A. Yes.

Q. When they have reached the end of the line in toward the bunker, you pull the handle? A. Yes.

Redirect Examination.

Mr. HEIDELBERG.—Q. Mr. Nelson, you know the proper way to dump these buckets, do you?

A. Yes.

Q. Do you consider that you dumped this bucket properly? A. Yes.

Q. In your opinion and your experience, does coal fall out of the bucket, out of the hopper and out of the bucket as this coal did when the bucket is dumped properly? Did that ever happen after this time?

A. I could not tell you.

Q. Did it ever happen with you before this time?

A. No.

Q. In other words, in your opinion, did the engineer leave that bucket inside of the hopper long enough to be dumped? A. Yes.

Q. He did not pull it back too quick? A. No.

Q. Do you remember a conversation you had with me at the city and county of San Francisco hospital on or about September first, when you were there injured? A. I remember you were out there.

Q. Do you remember a conversation you had with me? A. No.

Q. Did you have a conversation with me?

(Testimony of Harold Nelson.)

A. I had a few words [86] with you, yes.

Q. About 15 or 20 minutes? A. Yes.

Q. Didn't you at that time state to me that the engineer—that you dumped the bucket properly, but that the engineer pulled the bucket back too quickly?

A. No.

Q. What caused this trouble, this bucket of coal dumping back?

A. When I pulled the clutch, the tub swung in a little on me, and a good part of the coal went outside of the hopper.

Mr. PEART.—Q. You dumped this bucket the same as you dumped all the rest of them? A. Yes.

Q. The bucket was in the same position?

A. Yes.

Q. And part of this coal fell out because the bucket swung around? A. Yes.

Q. How did that parteiular tub come in? Did it come in any different from any other tub?

A. No.

Q. Just the same?

A. The same thing as I had the whole forenoon.

Q. Did it take you any length of time to find out to perform your duties as a dumpman? A. No.

Q. Do you consider it hard work at all? A. No.

Q. Mr. Nelson, you have got to dump that bucket while the bucket is swinging in the air, haven't you, in order to give it a chance to dump? A. No.

Q. Well, I mean that the bucket has got to be free, suspended? A. It has got to hang free.

Q. When you dump it? A. Yes.

(Testimony of Harold Nelson.)

Q. Did you pull it any harder than you pulled any of the others? A. No.

Q. It just happened to have this swing at the time it did? A. Yes.

Q. So far as you could see, you had plenty of room for the coal to fall into the hopper? A. Yes. [87]

Mr. HEIDELBERG.—Q. How far in the hopper did the bucket have to go before it dumped?

A. To the middle of the hopper.

Q. How far is that, about?

A. About 7½ feet.

Q. I think it has been said by Mr. Peart that the hopper is 15 feet—is that about right, 15 feet?

A. No, it is not 15 feet.

Mr. HEIDELBERG.—Isn't that so, 15 feet, Mr. Peart?

Mr. PEART.—About 12 feet, the distance that way.

The COURT.—How big is the bucket?

A. I cannot tell you.

Mr. HEIDELBERG.—Q. Previous to the time you had gone up there, how many men were engaged in dumping buckets onto these hoppers?

Mr. PEART.—I object to that as immaterial, irrelevant and incompetent.

The COURT.—The objection is overruled.

A. I don't know.

Mr. HEIDELBERG.—Q. Did you make any protest of any kind against going up there? A. No.

The COURT.—What is the size of the bucket?

A. About 4 feet square.

(Testimony of Harold Nelson.)

Q. And it would swing in about 6 feet inside of the hopper? A. Yes.

Q. How do you account for spilling the coal out of the hopper?

A. Because it swung halfway around.

Q. In saying 6 feet inside the hopper, I suppose you mean by that the movement of the bucket was 6 feet in. It would have to swing pretty well around in order to dump the coal outside of the hopper, wouldn't it?

A. When a tub dumps that throws the coal.

Q. Throws it over the side of the hopper?

A. In front of the hopper. [88]

Q. In throwing the coal over the side of the hopper, would it throw it down into the hatch?

A. Yes.

Q. Was this coal thrown over the side of the hopper? A. Yes.

Q. How far above the top of the hopper was this trolley that it works on? A. 10 or 12 feet.

Q. That is the place where you dumped?

A. Yes.

Q. The bucket when dumping, then, is 12 feet above the hopper?

A. 12 feet from the trolley, where the boom is.

Q. How far above the hopper is the bucket when it is dumped? A. About two feet.

Q. Two feet? A. Yes.

Q. You mean the bottom of the bucket, or the top of the bucket? A. The bottom.

Q. The top would be what?

(Testimony of Harold Nelson.)

A. The top turns and dumps it.

Mr. PEART.—Q. Mr. Nelson, when you dumped this particular bucket that killed Souza, were you standing where that man is there in this picture?

A. I was standing in that corner there; I don't know whether it is the same tower or not; it may be another tower. I was standing there.

Q. Right where that man is? A. Yes.

Q. This boom which has a carrier up here to carry the rope from which the bucket is suspended is about 12 feet above the top of the hopper?

A. Yes, about 12 feet.

Q. And the bucket swings by a steel cable over the hopper? A. Yes.

Q. With the bottom of the bucket about 2 feet above the lip of the hopper, or above the plank that you are standing on?

A. The plank that I was standing on.

Q. When you pulled the clutch on this bucket, you were standing in at the back part of the hopper, where it joins the bunker? A. Yes.

Q. Of course, the bucket is swinging on 12 feet of cable, because [89] it is hoisted by a cable, is it not? A. Yes.

Q. About 12 feet of cable?

A. Yes, or about 10 feet.

Q. About 10 feet, anyhow? A. Yes.

Q. And the coal, by reason of the bucket swinging around, went over the side of the hopper?

A. It came over this way and I pulled it back and then it came out and dumped sidewise.

(Testimony of Harold Nelson.)

Q. But you pulled the clutch the same as you pulled any other clutch that morning? A. Yes.

Q. The bucket came in just the same way?

A. Yes.

Mr. HEIDELBERG.—Q. How wide did you say that hopper was? A. 10 or 12 feet.

Q. How close was this to the back edge of the hopper, where that man is standing?

A. He is standing right in the middle, on one side.

Q. Does this cable go over further this way?

A. Yes.

Q. It goes over all the way? A. Yes.

Q. In order for you to dump it, it has to come in at least five or six feet inside before you can dump?

A. About 5 feet.

Q. Where you stand, you say it is only 2 feet above the hopper. And the bucket is about 4 feet wide, you say?

A. About 4 feet; I never measured it.

Q. Then you want us to understand if you dumped this bucket 6 feet inside that it could dump coal away back over here by the force of it swinging?

A. It was dumped properly, but it swung sidewise.

The COURT.—We will take our recess now until two o'clock.

(A recess was taken until two P. M.) **[90]**

AFTERNOON SESSION.

Testimony of Mary F. Souza, for Libelant.

MARY F. SOUZA, called for the libelant, sworn.

Mr. BRADLEY.—Q. Mrs. Souza, where do you live? A. 1070 Third street, Oakland.

Q. How long have you lived there?

A. Four months.

Q. Are you the widow of Manuel Souza, who lost his life August 5, 1916? A. Yes.

Q. When were you married?

A. I was married in June—I forget the date.

Q. Do you remember the year?

A. It was in June.

Q. Do you remember the year? A. No.

Q. When was it with reference to the fire—the same year?

A. Yes, the time of the earthquake was in Oakland. I married in June.

Mr. PEART.—We will stipulate, Mr. Bradley, that the parties were married in 1906.

Mr. BRADLEY.—The certificate is May 25, 1906, your Honor, and I will offer it.

Q. How many children has been born of your marriage? A. Eight children.

Q. How many are alive? A. Five.

Q. How many were living when Manuel Souza lost his life? A. Four.

Q. One has been born since that time?

A. Yes, five months after my husband was killed.

Q. Five months after your husband was killed?

(Testimony of Mary F. Souza.)

A. Yes.

Q. What are the ages of those five children, their names and ages; start with the oldest one?

A. The oldest was three months when she died.

Q. The ones that were alive when he died. Now, the oldest one, what was her name? A. Eva.

[91]

A. Eva was 9 years old on Christmas Eve.

Q. Last Christmas Eve? A. Yes.

Q. What is the name of the next one?

A. Willie.

Q. How old is Willie?

A. Willie is 6 years; he will be 7 in June coming.

Q. And the next one? A. Alma.

Q. How old is Alma? A. Alma is 5 years.

Q. And the next one? A. Mabel.

Q. How old is the little child?

A. Four years in January.

Q. And the next one?

A. The baby is 13 months.

Q. That is the little one that was born after Manuel lost his life? A. Yes.

Q. What is the name of him? A. Manuel.

Q. Do these children go to school?

A. Three go to school, Eva, William and Alma.

Q. They are all in court, are they?

A. Mabel is in the hospital, sick.

Q. That is the next to the youngest one?

A. Yes, Mabel.

Q. She is in the hospital? A. Yes.

Q. What were the habits of Manuel Souza with

(Testimony of Mary F. Souza.)

reference to taking care of his family? Did he take good care of his family?

A. Yes, he was a nice fellow.

Q. Did he provide for the children fully, all your needs? A. Yes.

Q. How have you provided for the children since his death? A. I don't know what you mean.

Q. How have your taken care of the children, supported them, since he died?

Mr. PEART.—We object to that as immaterial, irrelevant and incompetent.

The COURT.—The objection will be sustained. I don't think it throws any light on the pending proceeding. [92]

Mr. BRADLEY.—Q. You don't know, do you, how much money he earned each week? A. No.

Q. Did he work most of the time? A. Yes.

Q. How much of the time did he work?

A. I could not say.

Q. Regularly, or off and on? A. Regularly.

Q. Regularly? A. Yes.

Q. Did he or not frequently work Sundays and nights?

A. Well, he used to work Sundays and nights, not every time, but once in a while.

Q. But he was constantly employed? A. Yes.

Q. Right along? A. Yes.

Q. Have you any other means of support than what you got from him to take care of yourself and children?

(Testimony of Mary F. Souza.)

Mr. PEART.—Objected to as immaterial, irrelevant and incompetent.

The COURT.—The objection is sustained.

Mr. BRADLEY.—Q. What was the age of your husband when he died? A. 36.

Q. How old are you? A. I will be 30 in June.

Cross-examination.

Mr. PEART.—Q. Mrs. Souza, your husband worked in coal most of the time?

A. Coal and cement and lumber.

Q. Weren't there times when there was not any work, when there were no ships?

A. Well, when there was coal he used to work in coal; when he didn't have no coal he used to go out and work.

Q. What pay would he get for that, the same as stevedore?

A. I don't know how much he would get.

Q. When he was doing the other work you don't know how much he got? A. No.

Q. You said that he worked right along. Out of a whole year, about how many months do you think he worked? [93]

A. I could not tell how many months he worked in the year.

Q. Do you think that he worked more than two-thirds of the time in working days?

A. I think he worked more.

Q. Mrs. Souza, when this matter was down at the Industrial Accident Commission, the company paid you every week for a while, didn't it? A. Yes.

(Testimony of Mary F. Souza.)

Q. It paid you $11.25 a week, didn't it? A. Yes.

Q. Altogether the records show, I think, $494. Do you think that is about right?

A. I could not tell you, because I did not mark it down.

Q. Did they pay you $11.25 a week from about the time your husband died? A. Yes.

Q. Up to about June, 1917; you remember that?

A. Well, the last check they sent to me was June 9.

Q. 1917? A. Yes.

Mr. PEART.—May it be stipulated that under a mistaken view in connection with this, Mrs. Souza was paid a total of $494.

Mr. BRADLEY.—I don't know the amount. You can prove that.

Mr. HEIDELBERG.—We will stipulate she was paid, but certainly not under a mistaken view,—if your records show the amount that was paid, we will stipulate to it.

Mr. PEART.—That is the record I have, the original vouchers here, that she was paid $494.

Redirect Examination.

Mr. BRADLEY.—Q. Mrs. Souza, there was a question or a contest about how much the earnings were of your husband in the proceedings before the Industrial Accident Commission, was there not? There was a difference about it?

A. There was a difference. [94]

Q. That is, you did not agree on the amount that was earned?

(Testimony of Mary F. Souza.)

Mr. PEART.—We will stipulate to that, if your Honor please.

Mr. HEIDELBERG.—At this time I would like to read into evidence the mortality tables, to show the expectancy of life of this man. I think if the certificate is right, it will be found that Manuel Souza in 1906 was 26 years of age, when he was married. This accident happened 10 years later, and of course he was 36 years old at that time. I think that is the clearest and best proof we can get. The other might be hearsay. I will read into evidence the Carlisle table, which shows man has an expectancy of life of 30.32 years; the American experience tables, of 31.07 years; 30 companies' experience of 31.43 years. Will that be stipulated, that that may go in evidence as read?

Mr. PEART.—Yes.

Mr. HEIDELBERG.—That is the libelant's case. **[95]**

Testimony of George Hayes, for Respondent.

GEORGE HAYES, called for the respondent.

Mr. PEART.—Q. Mr. Hayes, where do you reside? A. 3129 Dover Street, Oakland.

Q. What is your business?

A. Hoisting engineer.

Q. How long have you been a hoisting engineer?

A. 16 or 17 years.

Q. Were you employed by the Western Fuel Company in August, 1916, at the time that Souza was killed? A. Yes.

(Testimony of George Hayes.)

Q. Were you in the same position, Mr. Hayes, engineer on that day? A. Yes.

Q. Now, I call your attention to these photographs which have been introduced in evidence and ask you to clear up, if possible, any discrepancies or ambiguities in the testimony already given. These buckets are hoisted by the electric power?

A. Yes, they are.

Q. And that electric power is controlled by yourself as hoisting engineer? A. Yes.

Q. Where are you stationed when handling that electric power?

A. Just to the right of where this man was standing, in the tower.

Q. Up in the bunkers? A. In the tower.

Q. Up in the tower; it is called a tower, is it?

A. Yes.

Q. About how high is the hopper above the deck of the "Tancrid" as she lays there by the bunkers?

A. I should judge around 70 or 80 feet.

Q. 70 or 80 feet? A. Yes.

Q. This bucket is hauled up by a steel cable?

A. Yes.

Q. And when the bucket is pulled up to the arm, the boom which stretches out there, directly over the hatch, have you also [96] machinery which throws the bucket in towards the hopper as it raises; or does it move in towards the hopper after it has reached the proper height?

A. You can bring it in at any time.

Q. At any time you please? A. Yes.

(Testimony of George Hayes.)

Q. When the bucket is up at a sufficient height what do you do in order to bring the bucket over towards the hopper?

A. Release the automatic brake on the machinery and it comes in of itself.

The COURT.—Q. Does it come in by gravity? How does it swing in?

A. The top of the tower is probably 40 feet above this boom; the cable runs up from the tram to the top of the tower, and when you release the automatic brake the weight of the bucket brings this in of itself.

The COURT.—Q. By gravity? A. Yes.

Mr. PEART.—Q. When do you know when to start your machinery to hoist the bucket?

A. The whistle from the hatch-tender is the signal.

Q. A signal from the hatch-tender? A. Yes.

Q. Then you begin to lift the bucket? A. Yes.

Q. Then when it has reached the proper height you release the brake and the bucket swings over by gravity or rolls over on that arm until the bucket goes over the hopper? A. Yes.

Q. Do you always swing the buckets in the same distance? A. Yes.

Q. Have you an automatic stop on that, or how do you govern that?

A. It can only come in so far.

Q. It moves down so far? A. Yes.

Q. You have no control over that; when you release that automatic brake that brings it in the same distance each time? A. Yes. [97]

Q. How long have you been hoisting buckets of this

(Testimony of George Hayes.)

character with coal there at the Western Fuel Company's dock? A. About a month.

Q. About a month? A. Yes.

Q. You say you had been acting there as hoisting engineer for a number of years? A. Yes.

Q. Handling similar apparatus?

A. Well, derricks, structural steel, work of that kind, hoisting apparatus.

Q. All kinds of hoisting apparatus?

A. Yes.

Q. Do you recall the hoisting of the particular bucket, a part of the contents of which fell back into the hold? A. Yes.

Q. How did you proceed in the hoisting of that bucket?

A. Just the same as the usual procedure, just turned the electric current on, and when the bucket was up sufficiently high to clear the edge of the hopper I released the brake, it came in the same as the rest of the buckets.

Q. By the way, how far above the edge of the hopper is the bottom of the bucket as it swings in there?

A. Usually a couple of feet.

Q. What length of steel cable is used there between the bucket and the boom?

A. Around 10 to 12 feet—8 to 12 feet.

Q. Are you familiar with the tipping apparatus by which the bucket is dumped? A. Yes.

Q. You heard Mr. Nelson's testimony here this morning. Is that the fact that the dumpman simply pulls the clutch which tips the bucket over and dis-

(Testimony of George Hayes.)

charges the contents? A. Yes.

Q. Does the bucket tipper or dumpman stand in the position indicated in that photograph? You see a man right in there?

A. Sometimes they stand on that side and sometimes they used to stand on this side, in the same relative position from the hopper. [98]

Q. Either on one side of the hopper or the other?

A. Yes.

Q. And at the same distance from the lip of the hopper? A. Yes.

Q. Back towards the bunkers? A. Yes.

Q. It is in that position that the dumpman reaches for the clutch to dump the bucket? A. Yes.

Q. Now, what time of the day was it that this particular bucket was raised?

A. Just before 12 o'clock.

Q. Just before 12 o'clock? A. Yes.

Q. How do you fix that particular time in your memory?

A. That was the last tub I was going to hoist before I went off shift at noon.

Q. Had you known Mr. Souza for any length of time? A. No.

Q. You had not known him? A. No.

Q. Is it possible for you to hoist one bucket faster than another bucket?

A. It is possible to, but you know the electric motor will only run so fast; you can go slower than that if you like, but it is a steady speed at which the motor runs. That is the usual way it always runs.

Q. Did you hoist this bucket at the same rate of

(Testimony of George Hayes.)

speed that you hoisted all of the buckets that morning? A. Yes.

Q. How do you know when to drop *the* back the bucket, Mr. Hayes, or send it back on the boom?

A. You can plainly hear the coal falling into the hopper and then when it latches back you can see through the window.

Q. You have a window by which you observe that, have you? A. Yes.

Q. When you see that the coal has dumped then you apply the machinery or apply the power to it to pull it back? A. Yes.

Q. And drop it, then, down below?

A. Yes. [99]

Q. Do you receive a signal before dropping it?

A. No.

Q. You drop it without signal? A. Yes.

Q. Did you observe this particular bucket dumped?

A. I was watching it the same as I did all of them.

Q. How was this bucket dumped?

A. I could not see any difference from any of the rest of them, any of the other procedure; there was a little swing in the bucket as it came in, as there is to nearly every one.

Q. They have always a little swing one way or the other? A. Yes.

Q. With that length of cable holding them to the boom? A. Yes.

Q. But so far as you observed there was no difference in the dumping of this bucket than any other bucket? A. No.

(Testimony of George Hayes.)

Q. And you were looking, were you, at this bucket at the time? A. Yes.

Q. I wish you would explain to the Court how it was you could see that bucket. Could you show that from that big photograph?

A. The little one I think shows just as plainly.

Q. You were inside back of this window here?

A. Yes.

Q Which appears in the photograph as you look at it to the left of the man standing on the hopper?

A. Yes.

Q. Had you applied the power to that bucket to pull it back before it had fully dumped. A. No.

Q. Was the bucket fully dumped before you put the power on it to pull it back? A. Yes.

Q. After Sousa was injured did you pull him up in the same bucket? Did you drop the bucket into the hold and haul him up out of the hold with it?

A. The hatch-tender called for the bucket and I let it down and they brought him out of the hold in it, the same bucket.

Q. Now, in regard to the function of the man who dumps the [100] bucket; I think I have asked you this question; I don't want to repeat it if I can help it, but did I ask you whether or not it consists of anything except of pulling that clutch?

A. That is all.

Q. That is all he would have to do? A.

Cross-examination.

Mr. BRADLEY.—Q. Mr. Hayes, how long have you been working as hoisting engineer in unloading

(Testimony of George Hayes.)

ships with this bunker apparatus? What has been your experience as to time?

A. I went to work shortly after the 4th of July, the month previous.

Q. The month previous; that is the only work you entered upon on a coal bunker in unloading ships?

A. Yes.

Q. With this particular set of apparatus or apparatus of this kind? A. Yes.

Q. Now, the man who got killed had nothing to do with the operation of this machine, did he?

A. No.

Q. You had full control of the operation of the machine, did you?

Mr. PEART.—I object to that as calling for the opinion of the witness. He has testified that he handled the bucket according to the signal given.

Mr. BRADLEY.—My notes show that he said that he had personal control, and I want to get at the bottom of the matter.

The COURT.—I should think he would have had control even though he was obeying signals.

Mr. BRADLEY.—Q. There was a signal for hoisting the buckets out of the hold. That is true, is it not? A. Yes.

Q. And you worked on those signals? A. I did.

Q. Now, after the bucket was hoisted through the power which is [101] controlled by you, then you say when it got to the boom which carried it into the the bunker it came by gravity on a release of the clutch; you were standing at a window where you

(Testimony of George Hayes.)

could see the dump-tender and the bucket?

A. I could see the bucket.

Q. You don't know then what the dump-tender did in this case? A. He was on the opposite side.

Q. You don't know what he did on this occasion.

A. No.

Q. You saw this particular bucket, didn't you?

A. I did.

Q. You say that the bucket was fully dumped when you put the power on to pull it back. Now, as a matter of fact, the bucket never was fully dumped—isn't that true—except as it spilled into the hold?

A. There was no more coal left in it.

Q. When it started back?

A. No; I went down for the man.

Q. Do you mean to tell the Court when that bucket left the hopper and went out on that boom that it did not have any coal left in it?

A. I mean to say that I did not give it any power to go back there until I got a signal to go down after the injured man.

Q. You did not get a signal to send the bucket back? A. That was the last tub I was to take.

Q. You were going off shift? A. Yes.

Q. Assuming that there had been no accident before you went off shift would you have sent the bucket back? A. No.

Q. You would not? A. No.

Q. Then you did not try to send it back, did you?

A. No.

Q. How did it go back without power?

(Testimony of George Hayes.)

A. It did not go back.

Q. It takes power to send it out on that arm after it is dumped? A. It does.

Q. Was the power put on by you at all before you got knowledge [102] that the man was injured and killed? A. No.

Q. How did the bucket get out of the hopper?

A. It didn't get out of the hopper.

Q. Didn't it go back out on the arm and spill coal into the hold? A. No.

Q. Are you sure of that?

A. I know I did not give it any power to go out there.

Q. That is not the question. Did the bucket leave the hopper at all? A. No.

Q. It didn't? A. No.

Q. Then it stayed in the hopper and was fully dumped into the hopper; is that right?

A. It was fully dumped as far as it was in the hopper.

Q. Then what happened after that? After it was fully dumped in the hopper every bit of the coal was out of that bucket, what happened?

A. There was a little swing to the bucket and a few lumps hit the edge of the hopper I guess.

Q. Just a few small lumps?

A. I did not count them; there were several lumps.

Q. Little ones or big ones? A. Average size.

Q. Where did they go?

A. Part of them went in the hold and part on the back of the shed.

(Testimony of George Hayes.)

Q. But they fell out of the hopper, not out of the bucket; is that right? If the bucket was fully dumped they fell out of the hopper, and not out of the bucket; is that right?

A. Yes, they fell out of the hopper; they went out of the top.

Q. In other words, the bucket was subsequently dumped? A. As far as I know.

Q. You didn't take any action with reference to the operation [103] of the machinery to send the bucket back to the hold until you learned that there was an accident; is that right? A. I did not.

Q. Did the bucket make any motion to go back onto the arm, to go into the hold, before you got knowledge of the accident? A. No.

Q. It stayed right in the hopper? A. Yes.

Q. Was it clear in the hopper? A. Yes.

Q. It was clear of the edge of the hopper?

A. Yes.

Q. How far in?

A. I should judge around 5 or 6 feet.

Q. Then there could not have been any coal that fell out of the bucket into the hold, could there?

Mr. PEART.—I object to that as argumentative. He has described how it happened two or three times.

The COURT.—It is argumentative.

Mr. BRADLEY.—Q. At any rate you testified, did you not, that there was not any coal that fell out of the bucket into the hold?

A. It did not fall out of the bucket into the hold.

Q. None?

(Testimony of George Hayes.)

A. None out of that particular bucket at that time.

Q. You testified that there was no difference in the dumping of this bucket from any other bucket. You base that on the proposition that this bucket was fully dumped inside of the bunker? A. Yes.

Q. What happened on this occasion that was different from what usually happened, that is, according to your observation of what happened?

A. Outside of a few lumps going down.

Q. Do you operate the power machinery in your charge without any reference whatever to what the dumpman says, or do you? In the slipping of the clutch do you have any regard for that at all in doing your work? Do you take any notice of that?

A. I don't quite get you.

Q. You can't see the dumpman from where you were; you don't [104] know whether he has properly dumped it or not? A. I can see the bucket.

Q. Then can you tell? A. Certainly.

Q. Do you usually go by sight or by ear when a bucket is dumped. Which is the usual way?

A. Eyesight.

Q. And you saw this bucket? A. I did.

Q. On this occasion? A. Yes.

Q. Could you see in it? A. No.

Q. What could you see from that window in the tower?

A. I could see the bucket as it came in over the hopper.

Q. Anything else? A. That is all.

Q. Could you see the coal in it? A. No.

(Testimony of George Hayes.)

Q. How do you know all the coal was dumped out of it and it was empty?

A. Any time anything turns upside down it is very seldom anything is left in it.

Q. It does turn clear upside down? A. Yes.

Q. You can't see the coal coming out of it, can you?

A. Yes.

Q. Can you see the coal in it before it comes out?

A. No.

Q. Can you see whether all the coal came out?

A. I couldn't say that every lump came out positively; I didn't see it all.

Q. You say there was a considerable swing to the bucket? A. There was some swing to it.

Q. Was it swinging after it turned upside down?

A. Every bucket does.

Q. Was it swinging after it turned upside down?

A. Yes.

Q. How much of a swing?

A. That varies on the kind of coal that is in the bucket; the action of the coal falling out of the tub affects the swing.

Q. On this occasion how much was the bucket swinging after it turned clear over?

A. Probably four feet.

Q. Would that swing have any effect or tendency to keep the coal on the bucket? **[105]**

Mr. PEART.—I submit that is not a fair question because he is asking the witness about the swing of the bucket after the coal dumped.

The COURT.—The objection is overruled.

(Testimony of George Hayes.)

A. Would the swing have any effect?

Mr. BRADLEY—Q. Yes; does the bucket turn clear upside down, face down, or does it turn on an angle and spill the coal? You can tell me?

A. It turns very near upside down.

Q. It has a clearance of about two feet, to turn clear over?

A. If it is two feet from this rod that comes in it is six feet from the bottom of this.

Q. Then from the bottom of the bucket to the coal in the hopper on this occasion was how far?

A. I would say six feet.

Q. You are certain you did not send the bucket back? A. I am.

Q. How far to the right of the bucket is the tower where you are stationed? How much higher are you than the place where the bucket?

A. I am lower than the bucket.

Q. How much lower? A. Probably four feet.

Q. How far to the right? A. About 8 feet.

Q. Four feet lower and eight feet to the right.

A. Yes.

Q. As you look up and the bucket comes in you can see what happens with reference to dumping, whether the coal is all out, or not? A. Yes.

Q. You are certain that this bucket was completely dumped and that it did not go back out on the boom spilling coal as it went? A. I am.

Q. Can you state positively where the coal came from that went down into the hold? A. No.

Q. You don't know? A. No.

(Testimony of George Hayes.)

Q. Did you see any coal falling out at all?

A. I did.

Q. What caused the fall. [106]

Mr. PEART.—I submit the question has been asked and answered.

The COURT.—What caused it to fall?

Mr. PEART.—He said that the bucket swung slightly.

The COURT.—Four feet he said. Is that a slight swing?

A. That is afterwards—after it was dumped.

Q. What caused the coal to miss the hopper and go down into the hold? A. I could not say.

Mr. BRADLEY.—He says it did not miss the hopper, but that the bucket was completely dumped, and I want to know where the coal came from that went into the hold that he says he saw, several lumps. Where did that coal come from?

The COURT.—Q. You saw the coal falling, didn't you? A. Yes.

Q. Some went into the hold and some went on to the deck? A. Yes.

Q. Where did it fall from?

A. It was originally in this tub that came up; I don't know whether it was from the front of the hopper or the side of the hopper; I couldn't say.

Q. Was the hopper so full that it would not hold any more? A. No.

Q. The hopper goes in like this? A. Yes.

Q. If the coal once slipped inside of that it could hardly rebound and fall over, could it? A. No.

(Testimony of George Hayes.)

Q. Now, from your observation, as you saw it, just what caused that coal to fall—that coal which should have run down into the hopper, what caused it to go down into the hold, or to go on to the deck?

A. A few lumps must have struck this 12 by 12 timber on the edge of this hopper, and some lumps must have fallen on this timber and rolled overboard and went down below. [106½]

Q. Why should they fall on the timber?

A. I could not say.

Q. Would they fall on that timber when the bucket is properly dumped? A. It does quite often.

Q. There must be some defect in the machinery then? A. No.

Q. How wide is the hopper?

A. About 8 feet, I think.

Q. Eight feet clear?

A. No; it is tappered; it is about 8 by 12.

Q. 12 feet long and 8 feet wide?

A. Something like that.

Q. Do you mean to say that the bucket could not dump into a hopper of that size without spilling coal over the edges? A. I had nothing to do with the dumping.

Q. I am not asking you whether you had anything to do with the dumping. You say that it might have fallen on the edges, and I asked you whether the machinery was out of order and you said no, and I asked you if it was due to improper dumping and you said no. I want to know why in a hopper 12 feet long by 8 feet wide a 4 foot bucket cannot be

(Testimony of George Hayes.)

dumped without spilling the coal over the edge of the hopper?

A. In these tubs, the lumps kind of pound themselves together in there, sometimes and as it dumps over they fall out at the same time, and it makes the top swing a little.

Q. We will concede the bucket is pretty well loaded. Is there swing enough to swing it over the edge of the hopper?

A. No. It is just by the action of the coal going out of the bucket.

Q. It is always swinging? A. Yes.

Q. It always swings with the bucket loaded the same?

A. They are not all loaded the same; some have lump coal and some have small stuff; no two will dump exactly the same. [107]

Q. Do you think a larger hopper would answer for that problem? A. No, I don't think so.

Q. You don't think a hopper could be made large enough to prevent coal from tipping over the side?

A. Oh, it could be done.

Q. What I am trying to get at is how much liability there is any time for a similar accident to occur to the one that occurred that day. Is it liable to happen whenever a bucket of coal is dumped?

A. It has not happened since.

Q. Did it happen before?

A. No, not to my knowledge.

Q. Then this is a unique case, a unique occurrence, a single occurrence in all your experience.

(Testimony of George Hayes.)

Mr. BRADLEY.—Q. The lip of the hopper, does it stand up or does it run horizontal? That is the edge of the hopper, where the bucket comes in, is it tipped up, is it tipped back like that or is it level?

A. You can see from the plan in the picture it slopes in.

Q. Now, as you looked out there did you see any coal on the lip or the edge of the hopper, or would it go that way if there was anything up here?

A. Yes.

Q. Was there anything that knocked any coal out of there on to edge?

A. I couldn't see anything knocked out.

Q. How did that coal get out of there that you saw come out? A. I could not say.

Q. There was not anything hit it that you saw and you were looking at it? A. Not that I know of.

Redirect Examination.

Mr. PEART.—Q. Mr. Hayes, am I correct in saying that it is not uncommon for coal to fall out of the hopper?

A. No; lumps fall most any time; it is no uncommon thing. [108]

Q. In other words, in answer his Honor a few moments ago, you would have us understand that there was never that amount of coal spilled before or after that you know of?

A. I meant there has been no accident similar to that, not that same amount or anyone killed.

Q. Either in the same amount of coal falling or in one getting killed?

(Testimony of George Hayes.)

A. Yes. I guess there has been the same amount at different times but nobody has been hurt.

Q. Some coal does from time to time drop out of the hopper, does it not? A. Yes.

Q. Did I understand you correctly in saying that in the act of dumping the coal out of the bucket a certain class of coal gives it each time about the same amount kick? A. Yes.

Q. Have you ever seen coal drop out of the hopper before while the bucket was being dropped?

A. Yes, quite often.

Q. Have you been working since as winchman over there at the Western Fuel Company? A. Yes.

Q. Now, since this accident in August, 1916, have you on more than one occasion seen coal drop out of the hopper as the bucket was being dumped?

A. Yes, occasionally.

Q. Occasionally it happens? A. Yes.

Q. Have you noticed anything unusual in the act of the dumpman in dumping these buckets where the coal has dropped over? A. No.

The COURT.—Q. The coal dumpman stands practically in the same position, does he, all the time?

A. Yes.

Q. And the dumpman, the bucket, must come within his reach? A. Yes.

Q. And that brings the tub within the lip of the hopper?

A. Yes, I should judge around six feet. [109]

Q. Does the tub right itself automatically?

(Testimony of George Hayes.)

A. Yes.

Q. As soon as it comes out and come back you can hear the click or catch after it goes? A. Yes.

Q. Sometimes you go by that in sending it back?

A. No, we always watch it.

Q. Did this coal spill over the sides of hopper?

A. I could not say whether it spilled over the sides or which side it was.

Q. Or the front?

A. I don't think it went over the front.

Q. There was some kick sidewise then that spilled that over the side? A. I believe so.

Q. Not the back kick from the dumping of the coal?

A. I could not say just what it was. There is always a little swing to the bucket as it comes in. If it dumps there is no swing.

Q. Of course the swing from the bucket as it comes in may be either fore and aft or lateral?

A. Yes.

Q. Do you recall which way it was that day?

A. I could not state, no.

Q. The swing that comes from the kick of the coal when it is dumped, which way is that, does it go sidewise or backwards?

A. Well, if you bring a weight on the end of any strand of a cable or wire rope, the weight on there has a tendency to unwind this cable, and the bucket always has a little circular motion; which way the tub was faced when the load was dropped I could not say; I did not pay any particular attention to that.

(Testimony of George Hayes.)

Q. If the tub was properly dumped, it should face inward?

A. The latches on tub are on one side and on some on the other.

Q. But with a proper dumping of the tub it would require the tub to dump inward toward the hopper and not outward toward the end of the hopper?

A. I would not say which was the proper [110] way.

Q. There would be less danger of coal falling over the edge of the hopper if it was dumped inward, toward the center of the hopper, than if it was dumped outward toward the outer edge of the hopper? A. I don't think so.

Q. I don't know. I may be mistaken. It seems to me that the proper way would be to dump in and not in, towards the bunker and not out towards the ship; so far in that there would not be any danger of throwing the coal back into the hold, if you have 12 feet one way and 8 feet the other—the hopper is that large, isn't it?

A. The hopper is that large, but the 12 feet is running back in here; not 12 feet over here.

Q. I mean it is 12 feet that way and 8 feet the other?

A. But the bucket hangs in here so that it is 4 or 6 feet inside of the hopper.

Q. Now, if it is 4 feet inside, that would leave you eight feet still further in, wouldn't it, in the hopper?

A. That is four feet from the outer edge of the hopper.

(Testimony of George Hayes.)

Q. You mean the outer edge of the tub is four feet from the outer edge of the hopper? A. Yes.

Q. That is when it reaches the place to be dumped?

A. Yes—around 6 feet.

Q. Now, you have 12 feet altogether lengthwise and 8 feet sidewise, haven't you?

A. I think that is the size of it. I would not say.

Q. There would be less danger of coal going over the edge of the hopper if it was dumped lengthwise of the hopper, wouldn't there, than if it was dumped the other way? You see it would have a great space to fall in, without hitting the edge of the hopper or going over the hopper, wouldn't it?

A. I *should* [111] *so;* I think so.

Q. Do you know whether this coal fell over the edge of the hopper of either side or whether it fell over the front of the hopper? If it fell over the back of the hopper would it reach the deck? A. No.

Q. It must have fallen over on one side or the other, or in front? A. Yes.

Q. Either it must have fallen on the side that it came in on, or on the right or left-hand side?

A. Yes.

Q. You say you regularly dumped coal without any falling over, although occasionally it does fall over? A. Yes.

Q. And the bucket swings as a circular swing?

A. Yes.

Q. It gets a kick when it is dumped? A. Yes.

Q. Which way does the kick generally come, toward the back of the bucket?

(Testimony of George Hayes.)

A. Yes, if the bucket dumps this way the kick will come this way.

Q. So that if the back of the bucket is toward the side of the hopper it is liable to come that way?

A. Yes.

Q. I still think, then, that the safer way to dump the coal should be when the bucket is facing lengthwise of the hopper, wouldn't you?

A. I suppose it would.

Q. You have got four extra feet to catch your coal that you have not got on the side? A. Yes.

Mr. BRADLEY.—Q. Did you see all the coal that fell out? I understood you to say that you saw all the coal that fell into the hold?

A. No, I did not say that.

Q. You saw some fall?

A. It all happened so quick—

Q. You saw some fall? A. Yes.

Q. They were small lumps and just a few of them, or were there many lumps, and a lot of coal that went over the edge of the [112] hopper?

A. There were only a few lumps.

Q. How big were they and how many? I do not want you to be exact.

A. They were all the way from as big as your fist to 100 pounds.

Q. As big as your fist to 100 pounds? A. Yes.

Q. A considerable number of lumps fell that weigh 100 pounds?

A. No, I would not say that any fell of 100 pounds. The coal that was in the tub was that weight.

Q. I mean the ones that you saw fall, how big were

(Testimony of George Hayes.)

they? Of course, you don't have to tell us if you don't know. Can't you indicate whether they were large or small?

A. They were, I should judge, as big as your fist or as big as your two fists.

Q. Was there a great quantity that went over the edge, or just a few lumps?

A. Just a few lumps.

Q. About as big as your fist? A. Yes.

Testimony of Harold Nelson, for Respondent (Recalled).

HAROLD NELSON, recalled for the respondent.

Mr. PEART.—Q. Mr. Nelson, have you ever had any experience as a stevedore rigger?

A. As a rigger, yes.

Q. You have been accustomed to working on the rigging up in the yards of ships? A. Yes.

Q. For how many years before August, 1916?

A. About 10 years, I guess.

Q. When this bucket comes in there on the hopper or to the hopper does it have some swing to it as Mr. Hayes described?

A. It swings, more or less, all of them.

Q. It swings more or less? A. Yes.

Q. As I recall your testimony I think you went into the rest [113] of the details of the matter. Was this bucket swinging more than usual as it came in? A. No.

Q. When you pull that handle does the entire bucket dump immediately or does it come out dropping slowly?

(Testimony of Harold Nelson.)

A. Sometimes it drops slowly and other times fast.

Q. Other times fast? A. Yes.

Q. When it comes out slow is it because the coal is wedged in the bucket?

A. I don't *know was* the cause of it.

Cross-examination.

Mr. BRADLEY.—Q. How did the coal come out of the bucket this time, slow or fast?

A. Slow.

Q. Did the bucket come out of the hopper immediately after the coal had come out of it slowly?

A. Mr. Hayes lowered the bucket down to hoist that man up.

Q. Did the bucket come out immediately after it was dumped before you knew there was an accident?

A. It went out.

Q. When the bucket came out did it have anything in it? A. No.

Q. You could see it dump? A. Yes.

Q. Did you see any coal fall?

A. I seen the coal fall over the side.

Q. Where did the coal come from that fell down the edge of the hold?

A. It came when the bucket dumped.

Q. It came from the bucket? A. Yes.

Q. Then the bucket was dumped outside of the hopper, was it not?

A. When the bucket swung—

Q. The bucket came out of the hopper and part of it was dumped outside?

A. Some of it was dumped outside. When I

(Testimony of Harold Nelson.)

pulled the latch the bucket swung broadside and dumped that way.

Q. How far into the hopper had the bucket gone?

A. Four feet. **[114]**

Q. How far was it swinging?

A. Maybe a foot.

Q. About a foot? A. Yes.

Q. It did not ever swing outside of the mouth of the hopper, did it?

A. The bucket did not swing out.

Q. How could the coal fall outside of the hopper?

A. From the force of the lumps as they come out of the bucket.

Q. The coal that went down into the hold fell out of the bucket, didn't it?

A. It fell out of the bucket, yes.

Q. Did you see it fall? A. Yes.

Q. You didn't give any warning?

A. I had no time.

Q. But the bucket did not move on the boom or trolley? A. The trolley did not move.

Q. Until you had the warning that there was something happened?

A. The trolley did not ever move.

Q. Was that your last bucket that you were to dump before you went off shift?

A. No, I came on shift at 12 o'clock.

Q. You had just come on? A. Yes.

Q. And Mr. Hayes was just going off, is that it?

A. Yes.

Q. You were just coming on and he was going off?

(Testimony of Harold Nelson.)

A. Yes.

The COURT.—Q. You were up there and saw the coal fall over the edge of the hopper. Did it fall from the front or side of the hopper?

A. Front of the hopper.

Q. And the coal fell out slowly?

A. Out of the bucket.

Q. There would not be much of a kick when the coal was falling out slowly, would there? A. No.

Q. The bottom of the bucket is about two feet above the top of the hopper? A. About two feet.

Q. How high is the bucket—we *could that* fact from anybody that knows.

Mr. PEART.—About 3 feet high, the bucket itself.

[115]

The COURT.—Q. About four feet across the top?

A. Yes, about four feet across the top.

Q. And across the bottom?

A. Three feet on the bottom.

Q. It had a foot clear at the top?

A. It comes out like that.

Q. You are quite certain that this coal fell over the front of the hopper instead of either side?

A. Yes.

Testimony of John Benson, for Respondent.

JOHN BENSON, called for the respondent, sworn.

Mr. PEART.—Q. Where do you reside, Mr. Benson? A. 1012 Lindon Street.

Q. What city? A. Oakland.

Q. What is your occupation?

(Testimony of John Benson.)

A. Engineer and foreman.

Q. Of what company?

A. The Western Fuel Company.

Q. How long have you been with that company?

A. About 14 years.

Q. Do you remember the killing of Manuel Souza in August, 1916? A. Yes, I remember it.

Q. Just tell the Court, now, Mr. Benson, something about this hoisting machinery. How long had the company had this machinery? A. Now?

Q. No, in August, 1916?

A. About four or five months.

Q. Are you familiar with other types of hoisting machinery? A. Yes.

Q. Is this the most modern and best adapted for the purpose of hoisting coal as far as you know?

A. Yes, supposed to be.

Q. Was this equipment in good or bad running order on the day that Mr. Souza was killed?

A. Good order.

Q. Did Mr. Hayes correctly describe the electric power as [116] applied to the hoisting of the buckets and the yard-arm and boom on which the bucket is carried toward the hopper and the position of the hopper itself? You heard his testimony.

A. Yes.

Q. He correctly described it? A. Yes.

Q. In other words, when the bucket is hoisted on the signal of the hatch-tender some 70 feet from the deck of the vessel up to the proximity, 10 or 12 feet below the yard-arm that sticks out there, the engi-

(Testimony of John Benson.)

neer simply releases the gravity control and the bucket then runs in over to the hopper? A. Yes.

Q. And the bucket always comes in the same distance over the hopper. Is that correct? A. Yes.

Q. Will you describe to the Court the system by which the bucket is dumped. What does the dumpman have to do?

A. He just has to pull the latch and the bucket dumps itself.

Q. Just pulls the latch and the bucket dumps?

A. Yes.

Q. Does the bucket invert itself, I mean, so as to dump its entire contents at once?

A. The bucket is balanced so that the minute you pull the latch it will dump over and empty the coal.

Q. Does the bucket come back as it empties, as Mr. Hayes described, if it is filled with lumps?

A. It will come back.

Q. You know the kind of coal you had in the buckets in August, 1916. Was it the kind of coal which would cause a bucket to kick?

A. It was mixed, but from the way they testified this morning, I think it was a tub throughout mostly of lumps. I did not see it myself.

Q. You did not see it yourself? A. No.

Q. Would that kind of a tub of coal which the men testified to this morning, would it cause the bucket to kick more than if [117] it was filled with fine screenings or stuff of that kind? A. Yes.

Q. Has the dumpman got anything to do besides pull that latch? A. That is all.

(Testimony of John Benson.)

Q. Is that something which calls for a particularly intelligent skillful man, or one with any particular training?

A. No, it has to be a man who is used to staying high up in the air.

Q. He has to be a man that is used to height?

A. Who is used to rigging.

Q. You selected Mr. Nelson for the purpose on this particular day because he had been a rigger?

A. I did, because I knew what he could do.

Q. Nelson had worked for the company how long before that?

A. He had been working for me I think a year and a half, something like that.

Q. Now, you have frequently seen this bucket dumped yourself, have you not?

A. I have seen them dump.

Q. Is it common or uncommon for coal to fall out of the bucket as it is being hoisted?

A. It will happen sometimes.

Q. Coal will fall out of the bucket as they are going up towards the yard-arm? A. Yes.

Q. Will coal also fall out of the hopper if the bucket is dumped in the ordinary and usual way?

A. It has happened sometimes.

Q. What would you say about the proposition about the coal in this particular case, according to Mr. Nelson, falling out of the front end of the hopper; how could that happen?

A. I cannot see any other way than that the bucket must have been all lumped, like they claim, and that

(Testimony of John Benson.)

they struck the iron plate that the tubs are lined with they must have bounced back. [118] That is the only way that I can see.

Q. That is the only way that you can see that that would happen? A. Yes.

Q. Will the coal on occasions fall out of the hopper if the bucket is dumped straight into the back of the hopper?

A. Well, I would not say; that would depend on the coal.

Q. It could happen with coal in a certain condition and with the hopper in a certain condition?

A. It will happen with lump coal.

Q. In other words, in handling coal there is always danger of falling coal either out of the buckets or out of the hopper with the best and most modern equipment? A. Yes, always is.

Q. How long have you been engaged in handling coal?

A. I have been hoisting coal for over 10 years; I have been foreman now for three or four years. I have been handling coal in different work.

Q. There is always danger from it?

A. There is.

Q. Now, what is the manner of shift in working the men there? Am I correct in saying that the winchman, the dumpman, hatch-tender and the stevedores form one *ship* or gang?

A. The dumpman, the engineer and the men in the hold form one shift.

Q. On this particular occasion Costa's shift were

(Testimony of John Benson.)

just quitting work and Duarte's shift was just coming on? A. Yes.

Q. You were not present and did not see the accident yourself? A. No, I was down in the yard.

Q. Did you get over there shortly afterwards?

A. No, I did not get down there before they had hoisted the man out of the hold.

Q. They had him out of the hold then? A. Yes.

Q. Am I correct in saying that this tub was about 4 feet wide; is it a square box or a parallelogram?

A. No, it is not [119] square; it is about 3 feet 6; somewhere around 3 feet high at the highest point, and I think about the same width at its widest part.

Q. About the same width? A. About that.

Q. Is it wider than it is this way—assume that this is the tub? A. No; it is lower on the back.

Q. It is lower on the back? A. Yes.

Q. When it gets up there it is suspended by a single steel cable or fall? A. Yes, a single fall.

Q. Do these buckets have a tendency to swing to a certain extent, with only 10 or 12 feet of cable supporting it, when the bucket is moving in towards the hopper? A. They are bound to swing some.

Q. They are bound to swing some? A. Yes.

Q. Now, is this latch by which the bucket is dumped the only thing for the dumpman to grab? He reaches up and grabs that? A. Yes.

Q. That is the only thing he could get hold of?

A. Yes.

Q. When that bucket has come in as far as it usually swings it is his job to pull that latch?

(Testimony of John Benson.)

A. It is his job to pull that latch.

Cross-examination.

Mr. BRADLEY.—Q. How soon after this man was killed did you get to the scene of the accident?

A. I did not see Mr. Sousa until he was pulled up out of the hold.

Q. How soon did you get to where the accident was?

A. I didn't go near the ship because I took the man up to the hospital the first thing.

Q. You never did see where the coal was lying?

A. I saw it in the afternoon, yes, about 2 or 3 hours afterwards.

Q. Was there any coal on the deck between the edge of the hatch and the lip of the hopper?

A. Yes, there were a couple [120] of lumps.

Q. Big ones?

A. No; when they fall about 60 or 70 feet they are not so very big.

Q. Did you investigate in the hold to see how much coal had fallen in there, where the man lost his life? A. There were some lumps.

Q. You looked to see, didn't you? A. Yes.

Q. Was there a considerable amount of coal there?

A. No.

Q. Very little? A. A little scattered around.

Q. Rather fine coal or was it crushed up by the fall?

A. I guess it probably weighed 5 or 10 pounds.

Q. You say that this bucket swings when it is loaded with the big lumps and swings some even if

(Testimony of John Benson.)

loaded with small coal? A. Yes.

Q. That is a source of danger for falling coal; have you ever done anything to check that knowing that it was dangerous?

Mr. PEART.—I object to that as immaterial, irrelevant and incompetent. I will withdraw the objection.

A. That belongs to the stevedore game; to hoist and swing; it goes up and comes in at the same time; that is the principle of the work.

Q. There is great danger with a swinging bucket that it will throw coal?

A. There is danger in any rigging when you hoist.

Q. That is the particular source of danger?

A. Swinging in any rigging there is.

Q. The danger is in the swinging, the kick back from the unloading?

A. No; you see it don't come along the boom; it comes free of the boom.

Q. It is suspended from the boom? A. Yes.

Q. Does the dump-tender get more wages than the ordinary [121] stevedore, a higher class of employment? A. No.

Q. What does he get?

A. At that time he got I think $75.

Q. Is it his duty at all to observe the effect of tipping that for dumping, or can he just dump it and forget it?

A. That is his duty, to see that the coal drops out the bucket.

Q. That is his duty? A. Yes.

(Testimony of John Benson.)

Q. So *he more* to do than merely swing that tug, he has the duty of supervision hasn't he, to see that everything works all right?

A. That is all a man can do.

Q. Who sent Nelson up there? A. I did.

Q. How long had you know him?

A. I had known him for—he had been working for me about a year and a half.

Q. You had the authority to send him up there, didn't you? A. Yes.

Q. You knew he had never done that kind of work before?

A. I knew he was competent to do the work.

Q. You knew that he had never done that kind of work before?

A. I wouldn't say—I don't know whether he had or not.

Q. You would not say whether he had or not?

A. No.

Q. There was nothing said about it between you and him?

A. No, I just sent the man up there because I knew he was competent.

Q. He was just going on that shift, wasn't he?

A. He had been up there all morning.

Q. He had been up there all morning?

A. Yes.

Q. He was wrong then when he said he was going on? A. He came from No. 3 tower.

Q. He had been working all morning at another place? A. He came on that shift. **[122]**

(Testimony of John Benson.)

Q. But he had not been working at that place?

A. In the next tower he had been dumping all morning.

Q. What is the angle to the lip of that bucket?

A. I should say about 45 degrees.

Q. Forty-five degrees? A. Yes.

Q. Now, if a lump of coal had hit that wouldn't it be more likely to bounce in than out at an angle of 45 degrees? A. What do you mean?

Q. You explained to the Court a while ago that a lump would hit that and bounce all out here with a 45 degree angle. Aren't you satisfied that if lump of coal did hit there it would bounce in instead of out?

A. There are two 45-degree angles. Which one do you refer to?

Q. Where is the other 45-degree angle?

A. Over on the other side.

Q. How far? A. I couldn't say.

Q. How far is it from here to the back of it where the other angle is?

A. About six feet, I should think.

Q. Do you mean to say it is only six feet from the lip of the bunker to the back where the other angle is?

A. There is one on front and one on back, and the coal could strike either one.

Q. You mean to say a lump of coal could bounce from the back of the bunker six feet and out?

A. I have not seen it in this particular hopper, but

(Testimony of John Benson.)

I have seen it in others, where I have been hoisting for years.

Q. You have been at that plant ever since it was started, haven't you? A. Yes.

Q. Is there anybody who is representing the company who has charge of the matter of the change of shifts or gangs as **[123]** come off or go on?

A. There is the foreman for each gang; they are working under me.

Q. They are working under you? A. Yes.

Q. Did you have any direct superintendence on this day, on this occasion, to see that the shifts were properly changed and that one whole shift did not go on until the other shift came off, or that one did not come off until the other came on, so that the work would not be continued when the whistle blew?

A. No; we are union men and it is the rule to go down in the hold at 12 o'clock.

Q. They were complying with the rule weren't they?

A. Probably they were; I did not see them.

Q. But you exercised no superintendence to see that Benson, Nelson and Hayes, their work should be so co-ordinated that they would be working together?

A. I could not stay in two different places and see the men get relieved when it was 12 o'clock.

Q. Do you have any rule with reference to that?

A. The union has rules that whenever you change shifts you change at 12 o'clock, and then men go

(Testimony of John Benson.)

down in the hold when the whistle blows.

Q. The union does not boss the job; it does not superintend the job? A. They cover the job.

The COURT.—You had better not go into that.

Mr. BRADLEY.—Q. This bucket does not flop clear over, upside down, does it?

A. Not quite clear over.

Q. It dumps at a very high angle? A. Yes.

Q. How does it right itself after dumping?

A. It is balanced so that it comes back and rights itself. **[124]**

Redirect Examination.

Mr. PEART.—Q. Mr. Benson, I understood Mr. Costa to say when he was on the stand this morning that the Stevedores in his gang were loading coal right in the hatch. I called his attention to the fact that these buckets had wheels on them to be wheeled over to the interior of the vessel away from the hatch, to clean up and that, and he told me in answer to my question that there was plenty of coal right in the hatch. Now if that is so—in the first place, is that so, or not?

Mr. BRADLEY.—I object to the question as not proper cross-examination.

The COURT.—The objection is overruled.

Mr. PEART.—Was there coal there to be loaded directly in the open hatch? A. No.

Q. Counsel asked you this question, as to whether or not you observed any great quantity of coal presumably as having fallen out of this bucket. I was trying to understand how you could observe that if

(Testimony of John Benson.)

the hatch was full of coal that the men were loading; what quantity was there in the hold of the vessel below this open hatch?

A. We do not use the small buckets until the hatch is cleaned out. We use the grab-buckets until that time and then we use the small tubs.

Q. You use another type of bucket when the coal is in the face of the open hatch? A. Yes.

Q. And these buckets were being used to clean out the inside of the ship with, were they?

A. Clean out the wings.

Q. What coal was there under that open hatch when you saw it in the afternoon?

A. There were probably a few lumps.

Q. A few lumps? A. Yes.

Q. Was the hold of the vessel otherwise clean of coal underneath the open hatch?

A. To the middle of the hatch, yes. [125]

Q. What coal was there there for the men to work in?

A. At the wings.

Q. Were the wings covered by the deck?

A. No. We take all the coal we can from the wings before we put the small tubs in and then we leave some 6 or 8 tons of coal in the wings.

Q. Looking down at the "Tancrid" here it seems to be a solid deck. If the coal was cleaned out right underneath the open hatch there then the men were working under the decks, weren't they? in filling these buckets?

A. Of course there is coal out in the wings; they

(Testimony of John Benson.)

have got room to take the coal; they take the stuff and they work in under the covered deck.

Q. They work in under the covered deck

A. Yes.

Q. From the condition of the vessel as you saw it there at 2 o'clock in the afternoon, the men in the morning had been working around cleaning up?

A. Yes.

Q. There was no other coal for them to work in directly within—directly under the open hatch?

A. No, there was no coal in the open hatch.

Q. There was just a little coal that came out of this bucket? A. Yes.

Recross-examination.

Mr. BRADLEY.—Q. Not enough to hurt a man, if it fell on him: Is that the idea?

A. It would hurt you all right.

Q. Do you know whether the grab-bucket was in operation that day or had it been broken down?

A. We had not broken a grab-bucket.

Q. Was the machine that operated it broken down that day? Were you using the tubs because the machine had broken down?

A. We use the small tubs in every ship, after we are through **[126]** with the grab-buckets.

Q. It was not out of order?

A. Not that I know of.

Mr. PEART.—Q. Do you know Mr. Benson when they put these buckets on and when they stopped using the grab-buckets?

(Testimony of John Benson.)

A. No, I don't exactly remember what time they put them on.

Q. But from your observation there at 2 o'clock in the afternoon they were not working in any coal under the hatch?

A. Not working under the hatch; they were working away from the hatch.

Q. In portions of the hold covered by the deck?

A. Yes.

Mr. PEART.—That is our case.

Testimony of Manuel Repose, for Libelant (In Rebuttal).

MANUEL REPOSE, recalled in rebuttal.

Mr. HEIDELBERG.—Q. I believe you testified this morning that you watched this bucket come up and go into the hopper to be dumped? A. Yes.

Q. You testified also I believe that that bucket came out? A. Yes.

Q. Right away? A. Yes.

Q. That bucket goes in on what they call a carriage with wheels? A. Yes.

Q. Did you notice whether or not when that bucket came out that it came out because that carriage was pulled back, or did it come out because it was swung back?

A. It came back when it made a swing.

Q. Did that carriage move out with the bucket?

A. It came [127] right out again.

Q. How far out beyond the bucket did that go?

A. It came about four feet out of the bunker.

(Testimony of Manuel Repose.)

Q. What was the bucket doing by the time that that was four feet outside of the bunker?

A. I don't know; when I hollered I ran underneath so I didn't see.

Q. You testified this morning that you saw the coal spilling out?

A. I saw the coal all falling out.

Q. You are aware of how much coal comes in a bucket? A. Yes.

Q. How much of this coal would you say spilled out of this bucket? down at the hold, just from what you saw?

A. It was over 200 pounds; it was all big lumps that were all filled in by hand.

Q. Would that be half the bucket, or what?

A. More than half the bucket.

Q. You are positive, are you, from your observation that that coal fell out of the bucket and not out of the hopper?

A. Not out of the hopper, out of the bucket.

Cross-examination.

Mr. PEART.—Q. You have been a stevedore three months? A. Yes.

Q. Did you estimate how much coal was falling by seeing it in the air, or did you figure it?

A. No, I did not figure it because I ran away, when I saw all those lumps falling down.

Q. Did you look at it after it got down on the deck?

A. I run underneath the deck there because I didn't want the coal to hit me.

(Testimony of Manuel Repose.)

Q. You ran under the covered portion of the deck, didn't you? You got away from the hatch and ran here where it was covered. A. Yes. **[128]**

Q. Did you see the coal down there afterwards, after it fell down? Did you see about half a bucket there on the deck afterwards?

A. I didn't see it because I went out to my dinner. I know that coal fell right down. It fell right on top of the hatch too, some came right down. Of course when I looked up I saw the whole thing coming down and I ran away.

Q. You could look up from where you were under the hatch?

A. Yes, and I could see where it was dumped too.

Q. You could see the man who was dumping it?

A. Yes.

Q. Plainly? A. Yes.

Testimony closed.

[Endorsed]: Filed Jun. 12, 1918. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. **[129]**

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY.—No. 16,248.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,

Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,

Libellees.

Opinion and Order for Entry of Decree in Favor Libelants, etc.

HENRY HEIDELBERG, Esq., and CHRIS M. BRADLEY, Esq., Proctors for Libelant.

IRA S. LILLICK, Esq., and HARTLEY F. PEART, Esq., Proctors for Libelees.

The legal principles involved in this action are by no means clear, but a careful consideration of all the authorities cited by the parties, or found by myself, leads me to the following conclusions:

1. The Workman's Compensation Act of California does not apply where the employee killed or injured is a stevedore engaged in loading or discharging cargo. Southern Pacific Co. vs. Jensen, 244 U. S. 205.

2. In such case the following provision of said Act, (Sec. 12 C): "In all other cases, where the conditions of compensation do not occur, the liability of

the employer shall be the same as if this act had not been passed," prevents the other provisions of the Act from applying where, [130] as here, a first condition necessary for the application of the Act is lacking, that is, that both employer and employee are subject to the compensation provisions of the Act. The repealing clauses of the Act therefore do not repeal the laws theretofore enacted which would be applicable to the instant case.

3. Section 1970 of the Civil Code of California would warrant an action and recovery in the courts of the state, because the accident here was caused by the negligence of a co-employee employed on a machine or appliance other than that upon which the deceased was employed (Korander vs. Penn Bridge Co., 16 Cal. App. 249, and because it was also due to the negligence of the hatch-tender in not giving warning and the hatch-tender under the evidence was one having the right to control and direct the services of deceased (Foutz vs. City of Los Angeles, 167 Cal. 487).

The Rosenberry Act of 1911 might also warrant such action and recovery because it does away with the doctrine of assumption of risk, and the defense that the accident was caused by the negligence of a fellow-servant.

4. As the beneficiaries here were for a year engaged in the prosecution of their supposed rights under the Workman's Compensation Act, their delay in bringing the present action is accounted for so as to remove the bar of limitations. Fill vs. Cunard Co., 217 Fed. 84.

5. Where a right of action is given by a state statute it will be enforced in the Admiralty Court if the cause of action is one of admiralty cognizance, Buttner vs. Adams, 236 Fed. 105, and the injuries to a stevedore and the rights and liabilities of the parties in connection therewith are within the admiralty jurisdiction. S. P. Co. vs. Jensen, supra. **[131]**

6. The death of Souza was due to the negligence of Hayes in withdrawing the bucket from the hopper before it was fully dumped, and to the negligence of the hatch-tender in not giving warning to those in the hold.

7. The deceased was not guilty of contributory negligence in being where he was, as there was coal there to be discharged and he was preparing to discharge it. Nor did the risk of his employment include the dumping of the quantity of coal that fell through the hatch at the time of the accident, even though it be conceded that he assumed the ordinary risk of his employment due to the occasional falling of a lump of coal.

8. From these conclusions it follows that libelant is entitled to recovery. A decree will be entered against the Fuel Company for the sum of $9,506.00 and costs, being $10,000.00 less $494.00 already paid.

Libelant may amend by including in his averments that the hatch-tender was negligent and that the accident was also due to such negligence.

The libel will be dismissed as to Nelson and Weisel, with costs awarded to them.

M. T. DOOLING,

Judge.

April 30, 1918.

[Endorsed]: Filed Apr. 30, 1918. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. **[132]**

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,248.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,

Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,

Libelees.

(Second Amended) Libel for $50,000 Damages.

To the Honorable MAURICE T. DOOLING, Judge of the District Court of the United States, in and for the Northern District of California, First Division:

Now comes the above-named libelant, Antone Garcia, and by leave of Court first had and obtained, files this his second amended libel:

I.

Western Fuel Company now is and at all the times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of California, and regularly transacting business in said State.

II.

Manuel Souza died intestate in the city of Oakland, county of Alameda, State of California, on the 5th day of August, 1916, being at the time of his death a resident of the County of Alameda, State of California, and leaving estate therein.

Thereafter and on the 15th day of March, 1918, the Superior Court of the State of California, in and for the county of Alameda, by its order duly given, made and entered, appointed **[133]** said Antone Garcia, libelant herein, administrator of the estate of said Manuel Souza, deceased, and directed that letters of administration upon said estate be issued to him upon his qualifying as such administrator.

Thereafter and on the 15th day of March, 1918, said Antone Garcia duly qualified as such administrator, letters of administration upon the estate of said deceased were thereupon duly issued to said Antone Garcia, and he ever since has been and now is the duly appointed, qualified and acting administrator of the estate of said Manuel Souza, deceased.

III.

On the 5th day of August, 1916, said Manuel Souza was in the employ of libelee, Western Fuel Company, a corporation, being engaged in the occupation of stevedore, his duty at said time consisting of the unloading of coal for said Western Fuel Company, a corporation, from the steamer "Tancred," and was working at said time in the hold of said vessel.

IV.

On said 5th day of August, 1916, and while said

Manuel Souza was working as aforesaid on board of said vessel, and while in the employ and service of said Western Fuel Company, a corporation, said Manuel Souza lost his life in the following manner:

Said vessel was at said time at anchor in Oakland Creek, a navigable tributory of the bay of San Francisco, in the State of California. Said vessel was at said time under the charter of the Western Fuel Company, a corporation, and was loaded with coal consigned to said Western Fuel Company, a corporation, and said vessel was at said time lying alongside of Howard Wharf, located in said Oakland Creek, and was discharging coal from the main hatch of said vessel into hopper No. 2 of said wharf in the following manner. **[134]**

Said coal was first loaded from the hold of said vessel into steel bucket or container, and when said bucket or container was sufficiently loaded with coal said bucket or container was hoisted to a height of about 100 feet, or thereabouts, and thereupon said bucket or container was transferred by means of a yard arm boom a distance of 50 feet, or thereabouts, into said hopper or bunker. All of said operations of hoisting and transferring being done by means of an electric hoist or winch under the supervision and control of George Weisel, Engineer or "winchman," in the employ of said Western Fuel Company, a corporation. When said bucket or container was inside of said bunker or hopper it was the duty of Harry Nelson, "dumpman," in the employ of said Western Fuel Company, a corporation, to dump said bucket or container in such manner as to cause the coal con-

tained therein to discharge or spill into said hopper or bunker.

At all of the times herein mentioned libelee, Western Fuel Company, a corporation, had a hatch-tender in charge of the unloading crew of which Manuel Souza was a member, and it was the duty of said hatch-tender to warn said Manuel Souza, while at work as aforesaid, of any danger from falling coal, or otherwise.

On said August 5, 1916, libelees herein so negligently and carelessly performed said operation of transferring and dumping said bucket or container as to cause a great quantity of coal therein contained to be discharged or spilled into the hold of said vessel, instead of being wholly discharged or spilled into said hopper or bunker, and negligently and carelessly failed to give said Manuel Souza warning thereof, by reason of which negligence and carelessness of libelee, Western Fuel Company, a corporation, or its agents, and libelees, George Weisel and Harry Nelson, said Manuel Souza was struck upon the head by said coal so discharged or [135] spilled into the hold of said vessel and fatally injured, to wit, his skull being fractured, from which injury said Manuel Souza, on the 5th day of August, 1916, died.

V.

Said death of said Manuel Souza was caused by the carelessness and negligence of libelees herein, and without any negligence or carelessness on the part of said Manuel Souza.

VI.

Said Manuel Souza, on the 5th day of August, 1916, was and for a long time prior thereto had been the husband of Mary Souza, and was, on the 5th day of August, 1916, the father of Eva Souza, Willie Souza, Elma Souza, Mabel Souza and Manuel Souza, Jr., minors of the age of eight (8) years, five (5) years, four (4) years, three (3) years, and six (6) months, respectively. Said Eva, Willie, Elma, Mabel and Manuel Souza were at said time wholly dependent upon said Manuel Souza for maintenance and support. Said Manuel Souza at said time was of the age of thirty-eight (38) years, being strong, able-bodied and healthy, and a sober, hardworking, industrious man, and earning wages as stevedore in the amount of Thirty-five Dollars ($35) per week.

VII.

On or about the 25th of April, 1917, the Industrial Accident Commission of the State of California, after due proceedings before said body, duly and regularly made an order in favor of Mary Souza, and against the Western Fuel Company, a corporation, ordering said Western Fuel Company, a corporation, to pay to Mary Souza a certain sum of money, basing such award of said sum of money upon the finding of said Commission that said Manuel Souza came to his death while in the employ of said Western Fuel Company, a corporation, and while working as stevedore for said Western **[136]** Fuel Company, a corporation; from the award made as aforesaid said Western Fuel Company, a corporation, took an appeal to the Supreme Court of the State of Cali-

fornia, which said Supreme Court of the State of California, on or about the 6th day of August, 1917, made an order reversing, annulling and setting aside said award so made as against the said Western Fuel Company, a corporation, on the grounds that said Industrial Accident Commission was without jurisdiction to make the same.

VIII.

By reason of the death of said Manuel Souza, so caused by the negligence and carlessness of libelees herein, the heirs of said Manuel Souza, as above set out, have suffered damages in the sum of fifty thousand dollars ($50,000), no part of which has been paid.

IX.

All and singular of the premises herein are true and within the admiralty jurisdiction of the United States, and of this Honorable Court.

WHEREFORE, libelant herein prays that process may issue in due form of law according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction against said libelees, and that they may be cited and admonished to appear and answer on oath all and singular the matters aforesaid, and that this Honorable Court would be pleased to decree the payment of the aforesaid damages with costs, and that libelant herein have such other and further relief as in law and justice he may be entitled to receive.

HENRY HEIDELBERG,
CHRISTOPHER M. BRADLEY,
Proctors for Libelant. [137]

State of California,
City and County of San Francisco,—ss.

Antone Garcia, being duly sworn, deposes and says:

That he is the administrator of the estate of Manuel Souza, deceased; that as such administrator he is libelant in the above-entitled action; that he has read the foregoing libel and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

ANTONE GARCIA.

Subscribed and sworn to before me, this 2d day of May, 1918.

[Seal] HARRY H. SULLIVAN,
Notary Public.

Received a copy of the within this 3d day of May 1918.

IRA S. LILLICK,
HARTLEY F. PEART,
Proctors for Libelee, Western Fuel Company.

[Endorsed]: Filed May 3, 1918. W. B. Maling. Clerk. By C. W. Calbreath, Deputy Clerk. **[138]**

At a stated term of the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division (in Admiralty), held at the courtrooms in the Postoffice Building, in the City and County of San Francisco, State of California, on the 18th day of March, 1918. Present: Honorable MAURICE T. DOOLING.

IN ADMIRALTY—No. 16, 248.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,

Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,

Libelees.

Final Decree.

This case having been heard on the pleadings and proof, and evidence, oral and documentary, having been introduced, and having been argued and submitted by the proctors of the respective parties, and due deliberation having been had, it is now

ORDERED, ADJUDGED AND DECREED that libelee, Western Fuel Company, a corporation, pay to said Antone Garcia, as administrator of the estate of Manuel Souza, deceased, the sum of nine thousand five hundred six dollars ($9,506), being ten thousand dollars ($10,000) less the sum of four hundred ninety-four dollars ($494.00) heretofore paid to

Mary Souza, widow of Manuel Souza, and costs in the sum of forty-three dollars and ninety cents ($43.90), and it is further

ORDERED, ADJUDGED AND DECREED that said libel is hereby dismissed as to libelees George Weisel and Harry Nelson, and said libelees are herein awarded their costs.

M. T. DOOLING,
Judge.

Dated at San Francisco, California, this 13 day of May, 1918. **[139]**

Copy of within served on Hartley F. Peart, proctor for libelee Western Fuel Co. the 3d day of May, 1918.

HENRY HEIDELBERG.

[Endorsed]:Filed May 13, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Entered in Vol. 8, Judg. and Decrees, at page 93. **[140]**

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,248.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,
Libelees.

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Notice of Appeal.

To Antone Garcia, as Administrator of the Estate of Manuel Souza, Deceased, and to Chris M. Bradley and Henry Heidelberg, Esquires, His Proctors, and to W. B. Maling, Clerk of the District Court of the United States, for the Northern District of California, Southern Division, First Division:

You, and each of you, will please take notice that Western Fuel Company, a corporation, libelee, appeals to the United States Circuit of Appeals, for the Ninth Circuit, from the Final Decree of the District Court of the United States, for the Northern District of California, entered in said cause on the 13th day of May, 1918.

Dated: May 22d, 1918.

HARTLEY F. PEART,
IRA S. LILLICK,
Proctors for Libelee.

Due service and receipt of a copy of the within notice, etc., is hereby admitted this 22d day of May, 1918.

CHRIS. M. BRADLEY,
HENRY HEIDELBERG,
Proctors for Libelant.

[Endorsed]: Filed May 22, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[141]**

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In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,248.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,
Libelees.

Assignment of Errors.

Now comes Western Fuel Company, libelee and appellant herein, and claims that in the record, opinion, decision and final decree in said cause, there is manifest a material error, and said appellant now makes, files and presents the following Assignment of Errors, on which it relies, to wit:

1. That the District Court erred in rendering the decree entered herein upon the 13th day of March, 1918, against the libelee, Western Fuel Company.

2. That the District Court erred in overruling the exceptions to the amended libel on file herein, upon each of the following grounds, to wit:

(a) That said amended libel did not state facts sufficient to constitute a cause of libel against the libelee.

(b) That it does not appear from the said

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amended libel under what statute the libelant claims a cause of action. **[142]**

(c) That the first amended libel was insufficient and it could not be ascertained therefrom how, or wherein, this libelee was negligent.

(d) That the cause of action set forth in the first amended libel is barred by the provisions of Section 340, subdivision 3, of the Code of Civil Procedure of the State of California.

(e) That the cause of action set forth in the libel is barred by the laches of the libelant.

3. That the District Court erred in permitting the libelee to file the second amended libel, which said second amended libel was filed on the 3d day of May, 1918.

4. That the District Court erred in failing to find that the alleged cause of action set forth in the libel is barred by the provisions of section 340, subdivision 3, of the Code of Civil Procedure of the State of California.

5. That the District Court erred in failing to find that no cause of action under said libel exists under any statute of the State of California, and hence none exists in admiralty.

6. That the District Court erred in finding that said libelee is liable in damages to the libelants by reason of the death of Manuel Souza.

7. That the District Court erred in failing to find that the death of Manuel Souza was caused solely through his own negligence, without fault or privity of libelee, Western Fuel Company.

8. That the District Court erred in failing to find

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that Manuel Souza's death was caused while voluntarily, and **[143]** without orders, undertaking to do the thing in which he was engaged at the time of the accident.

9. That the District Court erred in failing to find that the death of Manuel Souza was caused while in the performance of duties not within the scope of his employment, and with the nature and danger of which he was acquainted.

10. That the District Court erred in failing to find that the proximate cause of the accident was Manuel Souza's own negligence, in being at the place and position on the steamer at the time of the accident.

11. That the District Court erred in failing to find, if there was any negligence other than that of Manuel Souza himself, that it was the negligence of a fellow-servant, for which libelee is not responsible.

12. That the District Court erred in entering the decree for libelants for damages and costs.

13. That the District Court erred in not dismissing the libelant's libel.

14. That the District Court erred in failing to find that there was no statute in California at the time of the death of Manuel Souza affording a cause of action for the death of an employee under a maritime contract occurring through the negligence of an employer, and/or a fellow-servant.

15. That the District Court erred in failing to find that the evidence shows affirmatively that Manuel Souza was killed by an ordinary risk of his em-

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ployment which he had assumed, thus barring recovery.

16. That the District Court erred in holding that the Workmen's Compensation Act of California, sec. 12c, did not repeal the laws of California theretofore enacted, and particularly [144] sections 377, C. C. P., of the State of California, and 1970, C. C., of the State of California, as affording a cause of action to the libelant.

17. That the District Court erred in failing to find that Manuel Souza was a mere licensee at the time of his death and his death occurred not while in the performance of his duties within the scope of his employment.

18. That the District Court erred in holding, as shown by its decision, that the negligence causing the death of Manuel Souza was that of a coemployee (presumably the engineman or dumpman) employed on a machine or appliance other than that upon which the deceased was employed, as the evidence affirmatively shows that Manuel Souza was employed on the same machine or appliance.

19. That the District Court erred in holding, as shown by its decision, that the hatch-tender was not the fellow-servant of the deceased Manuel Souza.

20. That the District Court erred in failing to find that Manuel Souza was not guilty of contributory negligence, and that his negligence was not gross in comparison with that of the libelee, Western Fuel Company.

21. That the District Court erred in applying the provisions of section 1970 of the Civil Code of the

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State of California, in so far as the same defined a fellow-servant.

22. That the District Court erred in applying the provisions of the Roseberry Act of 1911, Statutes of the State of California, in so far as the same abolishes the doctrine of assumption of risk and the doctrine of negligence of a fellow-servant.

23. The District Court erred in not applying the principles of the admiralty law; namely, of contributory negligence and the doctrine of contribution flowing therefrom, the doctrine [145] of assumption of risk, and the doctrine of negligence of a fellow-servant.

In order that the foregoing Assignment of Errors may be and appear of record, said appellant files and presents the same and prays that such disposition be made thereof as is in accordance with the law and statutes of the United States in such cases made and provided, and said appellant prays a reversal of the decree herein heretofore made, and entered in the above-entitled cause, and appealed from.

Dated: July 9th, 1918.

IRA S. LILLICK,
HARTLEY F. PEART,
Proctors for Libelee and Appellant Western Fuel Company.

Due service and receipt of a copy of the within assignments of error is hereby admitted this 9th day of July, 1918.

HENRY HEIDELBERG,
CHRISTOPHER M. BRADLEY,
Proctors for Libelant.

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[Endorsed]: Filed Jul. 9, 1918. W. B. Maling, Clerk. By. C. M. Taylor, Deputy Clerk [146]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,248.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,

Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,

Libelees.

(Order Staying Execution.)

GOOD CAUSE APPEARING THEREFOR: It is hereby ordered that execution on the judgment heretofore made and entered in the above-entitled case be, and the same is, hereby stayed ten (10) days from date hereof.

Dated: May 24, 1918.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed May 24, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [147]

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In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,248.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,

Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,

Libelees.

(Supersedeas and Cost Bond on Appeal.)

KNOW ALL MEN BY THESE PRESENT: That the Western Fuel Company, a corporation, as principal and Globe Indemnity Company, a corporation, as surety, are held and firmly bound unto Antone Garcia as administrator of the estate of Manuel Souza, deceased, in the full and just sum of Eleven Thousand Dollars ($11,000), to be paid to the said Garcia, his successor, executor, administrator or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 23d day of May, 1918.

WHEREAS, the above-named Western Fuel Company, a corporation, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from a decree of the District Court in favor of

the above-named libelant, Antone Garcia, as administrator of the estate of Manuel Souza, deceased, signed on the 13th day of May, 1918, and entered on the 13th day of May, 1918, in the above-entitled cause, by the District Court of the United States in and for the Southern Division of the Northern District of California, First [148] Division thereof; praying that the said decree may be reversed; and

WHEREAS, the above-named appellant, Western Fuel Company, a corporation, desires to stay the execution of said decree in addition to giving bond for costs in the sum of Two Hundred and Fifty ($250.00) Dollars;

NOW, THEREFORE, the conditions of the above obligation are such that if the above-named appellant, Western Fuel Company, a corporation, shall prosecute its appeal to effect, and answer all damages and costs, if the appeal is not sustained, and further, that if said appellant will abide by and perform whatever decree may be rendered in the said cause by the said United States Circuit Court of Appeals for the Ninth Circut, or the mandate of said Court by the Court below, then this obligation shall be void; otherwise, this obligation shall remain in full force and effect.

WESTERN FUEL COMPANY,

[Seal] By D. E. NORCROSS,

Secretary.

GLOBE INDEMNITY COMPANY,

By DAVID DUNCAN, (Seal)

Attorney in Fact.

The premium charged for this bond is one hundred twelve 50/100 dollars per annum.

State of California,
City and County of San Francisco,—ss.

On this 24th day of May, in the year one thousand nine hundred and eighteen, before me, John McCallan, a notary public in and for the city and county of San Francisco, personally appeared David Duncan known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Globe Indemnity Company and acknowledged to me that he subscribed the name of Globe Indemnity Company thereto as principal, and his [149] own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[Seal] JOHN McCALLAN,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires April 12th, 1921.

State of California,
City and County of San Francisco,—ss.

On this 24th day of May, in the year one thousand nine hundred and eighteen before me, J. R. Cornell, a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared D. C. Norcross, known to me to be the Secretary of Western Fuel Company, the corporation described in and that executed the within in-

strument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office, in the said city and county of San Francisco, the day and year in this certificate first above written.

[Seal] J. R. CORNELL,

Notary Public, in and for the City and County of San Francisco, State of California.

My commission expires October 16, 1921.

[Endorsed]: Filed May 28, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[150]**

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,248.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,

Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,

Libelees.

Stipulation and Order Concerning Original Exhibits.

IT IS HEREBY STIPULATED AND AGREED,

by and between the proctors for the respective parties hereto, that all the exhibits introduced in evidence at the hearing of the above-entitled action, before the above-entitled court, may be omitted from the Apostles on Appeal in said cause, and may be filed in the United States Circuit Court of Appeals, for the Ninth District, in the original form in which they were respectively introduced before said Court at the trial of said case, and be considered as original exhibits for the Apostles on Appeal.

Dated: June 13th, 1918.

HENRY HEIDELBERG,
CHRISTOPHER M. BRADLEY,
Proctors for Libelant.

HARTLEY F. PEART,
IRA S. LILLICK,
Proctors for Libelee, Western Fuel Co.

It is so ordered.

M. T. DOOLING,
Judge. [151]

[Endorsed]: Filed Jun. 15, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [152]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,248.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,

Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,

Libelees.

Stipulation and Order Extending Time for Filing Apostles on Appeal.

IT IS HEREBY STIPULATED and agreed that libelant in the above-entitled case may have thirty (30) days from and after June 21st, 1918, within which to procure the filing in the United States Circuit Court of Appeals for the Ninth Circuit of the apostles and word in said cause with the certification of the above District Court thereunto attached.

Dated: June 13th, 1918.

HENRY HEIDELBERG,
CHRISTOPHER M. BRADLEY,
Proctors for Libelant.

HARTLEY F. PEART,
IRA S. LILLICK,
Proctors for Libelee Western Fuel Company.

It is so ordered.

M. T. DOOLING,
Judge, United States District Court.

[Endorsed]: Filed Jun. 15, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[153]**

In the Southern Division of the District Court of the United States in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,248.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,
Libelees.

Stipulation and Order Extending Time to File Apostles on Appeal.

IT IS HEREBY STIPULATED AND AGREED that the time for printing the record and filing and docketing this cause on appeal in the United States Circuit Court of Appeals, for the Ninth Circuit may be extended to and including the 17th day of August, 1918.

Dated: San Francisco, California, July 17, 1918.

HENRY HEIDELBERG,
CHRISTOPHER M. BRADLEY,
Proctors for Libelant.

Pursuant to the foregoing stipulation, it is hereby ordered that the time for the printing of the record, and docketing this cause on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby, enlarged and extended to and including the 17th day of August, 1918.

Dated: San Francisco, California, July 20, 1918.

JEREMIAH NETERER,
District Judge.

[Endorsed]: Filed Jul. 20, 1918. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [154]

Certificate of Clerk U. S. District Court to Apostles on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 154 pages, numbered from 1 to 154, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of Mary Souza, et al., etc., vs. Western Fuel Company, a Corp., et al., No. 16,248, as the same now remain on file and of record in the office of the clerk of said District Court; said Apostles having been prepared pursuant to and in accordance with the "Praecipe for Apostles on Appeal" (a copy of which is embodied in these Apostles), and the instructions of the proctors for respondents herein.

I further certify that the cost for preparing and

certifying to the foregoing Apostles on Appeal is the sum of Sixty-three Dollars and Forty-five Cents ($63.45), and that the same has been paid to me by the proctors for the respondents herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 9th day of August, A. D. 1918.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [155]

[Endorsed]: No. 3195. United States Circuit Court of Appeals for the Ninth Circuit. Western Fuel Company, a Corporation, Appellant, vs. Mary Souza, and Eva Souza, Willie Souza, Elma Souza, Mabel Souza, and Manuel Souza, by Antone Garcia, Their Guardian Ad Litem, and as Administrator of the Estate of Manuel Souza, Deceased, Appellees. Apostles on Appeal. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed August 9, 1918.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
By Paul P. O'Brien,
Deputy Clerk.

[Endorsed]: Printed Apostles on Appeal. Filed Aug. 22, 1918. F. D. Monckton, Clerk.

No. 3195

United States
Circuit Court of Appeals
For the Ninth Circuit.

WESTERN FUEL COMPANY, a Corporation,
Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Appellee.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1918, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the City and County of San Francisco, in the State of California, on Friday, the twenty-fifth day of October, in the year of our Lord one thousand nine hundred and eighteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable ERSKINE M. ROSS, Circuit Judge; The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3195.

WESTERN FUEL COMPANY, a Corporation,
Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Appellee.

Order of Submission.

Upon motion of Mr. Henry Heidelberg, counsel for the appellee, ORDERED leave granted to file Photograph of Wharf, Libelant's Exhibit "B."

Upon motion of Mr. Heidelberg, and good cause therefor appearing, ORDERED appeal submitted to the Court for consideration and decision, on briefs, without oral argument.

At a stated term, to wit, the October Term, A. D. 1918, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the Third day of February, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable ERSKINE M. ROSS, Circuit Judge; The Honorable WILLIAM H. HUNT, Circuit Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN JUDGMENTS AND DECREES.

By direction of the Honorable William B. Gilbert, Erskine M. Ross and William H. Hunt, Circuit Judges, before whom the cases were heard, ORDERED that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the clerk, and that a Judgment or Decree be filed, and recorded in the minutes of this court, in each of the causes in accordance with the opinion filed therein: * * * Western Fuel Company, a Corporation, Appellant, vs. Antone Garcia, as Administrator of the Estate of Manuel Souza, Deceased, Appellee. No. 3195. * * *

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3195.

WESTERN FUEL COMPANY, a Corporation,
Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Appellee.

Opinion U. S. Circuit Court of Appeals.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Before GILBERT, ROSS and HUNT, Circuit Judges.

ROSS, Circuit Judge:

The widow and minor children of Manuel Souza, deceased, filed, August 21st, 1917, in the court below, a libel against the appellant and two of its employees, to recover damages growing out of the death of the deceased while working as a stevedore in unloading coal from the hold of the steamer "Tancred," at the time operated by the appellant company under charter and discharging its cargo at the Howard Wharf in Oakland Creek, California—it being alleged that the death of the deceased was caused by the negligence of the libelees in the improper handling of the bucket by which some of the coal was spilled and fell upon the deceased, killing

him, on the 5th day of August, 1916. Subsequently the appellee was appointed administrator of the estate of the deceased and as such filed an amended libel, upon which the cause was tried. It will be seen from what has been said that the original libel was not filed until a few days more than one year after the death of the deceased.

The record shows, however, that on April 25th, 1917, his widow and minor children commenced proceedings for the recovery of the damages sustained by them, before the Industrial Accident Commission of the State of California, pursuant to the provisions of the Workmen's Compensation Act of 1913 (Stats. 1913, chap. 176), which Commission awarded them damages but which proceedings were subsequently annulled by the Supreme Court of the State following the decision of the Supreme Court of the United States in the case of Southern Pacific Company vs. Jensen, 244 U. S. 205, and other decisions of that court, the last of which was decided by that tribunal January 7th, 1919, in the case entitled Union Fish Company vs. John W. Erickson (Advance Sheets).

The present case being in admiralty it is obvious that no provision of the California statute above referred to has any application here, the rights, obligations, and liabilities of the respective parties being measured by the maritime law. In addition to the cases already cited, see The Lottawanna, 21 Wall. 558, 575; Butler vs. Boston Steamship Co., 130 U. S. 527, 557; Workman vs. Mayor, etc. of New York, 179 U. S. 552; South Covington & Cincinnati

Street Ry. Co. vs. South Covington et al., 235 U. S. 537; The Steamship Jefferson, 215 U. S. 130; The Chusan, Fed. Cas. No. 2717.

It is well settled that in the absence of an act of Congress or a statute of a state giving a right of action therefor, a suit in admiralty cannot be maintained in the courts of the United States to recover damages for the death of a human being on the high seas or on waters navigable from the sea, which is caused by negligence. The Harrisburg, 119 U. S. 199; The Alaska, 130 U. S. 201. Where, however, a statute of the state where the injury occurs gives such right of action, it will be enforced by a court of admiralty if of admiralty cognizance. Authorities *supra*, and Buttner vs. Adams, 236 Fed. 105; The Horsa, 232 Fed. 997; 1 Corp. Jur. 1290, and cases there cited.

There being no United States statute upon the subject, the appellee's right to recover in the instant case must be found in a statute of California.

Section 377 of its Code of Civil Procedure provides:

> "When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may

be given as under all the circumstances of the case, may be just."

The right upon which the judgment of the Court below rests was clearly given by that statute.

Subsequently Section 1970 of the Civil Code of California was enacted, which provides, among other things, as follows:

> "An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee, or unless the employer has neglected to use ordinary care in the selection of the culpable employee provided, nevertheless, that the employer shall be liable for such injury when the same results from the wrongful act, neglect or default of any agent or officer of such employer, superior to the employee injured, or of a person employed by such employer having the right to control or direct the services of such employee injured, and also when such injury results from the wrongful act, neglect or default of a coemployee engaged in another department of labor from that of the employee injured. * * * "

In the case of Gonsalves vs. Petaluma etc. Ry. Co., 173 Cal. 264, 266, the Supreme Court of that

state, after referring to the question as to the extent, if at all, the above-mentioned sections of the California statutes conflicted, said:

"It was for the consideration of this important question that a hearing before this Court was ordered. Heretofore this Court has not been called upon to determine the matter. Thus in Ruiz vs. Santa Barbara Gas Co., 164 Cal. 188 (128 Pac. 330), we declared that in that case it was immaterial whether it be considered that the action was brought by virtue of section 377 of the Code of Civil Procedure or by section 1970 of the Civil Code. Again in Pritchard vs. Whitney Estate Co., 164 Cal. 564 (129 Pac. 989), the only pronouncement of the Court upon this subject is that 'so far as injuries arising out of that relation are made actionable where death ensues, where they were not actionable before, section 1970 is now the only statute authorizing the action.' This, of course, is a perfectly sound declaration, but it is giving it an unwarranted meaning to say that by it this Court even intimated that the general provisions of section 377 of the Code of Civil Procedure were abrogated in every case of actions by the representatives of deceased employees. Indeed, it would call for very direct and positive language to lead a court to say that the lawmakers in giving the general right of action provided for by section 377 of the Code of Civil Procedure to everybody else and therein declaring that in every such action such damages may

be given 'as under all the circumstances may be just,' meant to deny that right of action and forbid that measure of recovery in the case of representatives of deceased employees, and to declare that as to them there could be no recovery at all unless the heirs of such employees were actual dependents upon them. But there is no language in our law which prompts, much less which forces, the view that the legislature thus designed to restrict this right of action in cases where the death of an employee had been negligently caused. Section 377 of the Code of Civil Procedure still remains in full force and gives the right of action and fixes the measure of recovery in all cases. Section 1970 of the Civil Code is to be construed with section 377, not as superseding it, and so construed it means, as declared in Pritchard vs. Whitney Estate Co., 164 Cal. 564 (129 Pac. 989), that when section 1970 has created rights of action growing out of the relationship of employer and employee, which rights of action did not formerly exist, such rights of action by the representative of an employee who has lost his life, may be prosecuted for the benefit of the class limited and designated in the section itself. So construed there is no conflict between the two sections. This construction, we repeat, is not only reasonable, but uniformly it is the construction which other courts have put upon their laws in cases where the provisions of those laws are similar or identical with our own. We need not be

at pains to review these authorities at length. It will be sufficient to refer to"—citing a number of cases.

April 8th, 1911, California passed another Act (Stats. 1911, p. 756), providing, among other things, as follows:

"In any action to recover damages for a personal injury sustained within this state by an employee while engaged in the line of his duty or the course of his employment as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent or servant of the employer, the fact that such employee may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee, and it shall be conclusively presumed that such employee was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employees contributed to such employee's injury; and it shall not be a defense:

"(1) That the employee either expressly or impliedly assumed the risk of the hazard complained of.

"(2) That the injury or death was caused in whole or in part by the want of ordinary or reasonable care of a fellow-servant."

The right of action for the death of the deceased being given by a statute of the state, a court of admiralty will enforce it (authorities *supra*), but enforce it in accordance with the recognized principles of maritime law unaffected by the provisions of any state or local law. Otherwise one admiralty court might readily be required to rule one way upon a certain state of facts, and another to rule another way upon a precisely similar state of facts, depending upon conflicting state or local laws, thus working the practical destruction of a uniform maritime law. For this reason the California statute of limitations of one year, relied upon by the appellant in bar of the action, has no more application to the case than had the California statute of frauds involved in the case of Union Fish Company vs. Erickson, *supra*, just decided by the Supreme Court.

The Court below found that the death of Sousa was caused by the negligence of the hatch-tender in withdrawing the bucket from the hopper before it was fully dumped, and to his negligence in not giving warning to those in the hold where Sousa was working as a stevedore and killed, and, further, that the deceased was not guilty of any contributory negligence.

Upon the record we see no sufficient reason to disturb those findings of fact.

We also agree with that court that the risk of his employment did not include the spilling of such a

quantity of coal through the hatch as inflicted the fatal injury, even though it be conceded that the deceased assumed the ordinary risk of his employment due to the falling of an occasional lump of coal.

We are of the opinion that upon the merits the case was rightly decided, and that we would not be justified in increasing the amount of the award, as the appellee contends we should, made by the trial court, which was $10,000.00, less $494.00 already paid.

The judgment is affirmed.

[Endorsed]: Opinion. Filed Feb. 3, 1919. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3195.

WESTERN FUEL COMPANY, a Corporation,
Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Appellee.

Decree U. S. Circuit Court of Appeals.

Appeal from the Southern Division of the District Court of the United States for the Northern District of California, First Division.

This cause came on to be heard on the Transcript of the Record from the Southern Division of the District Court of the United States for the Northern District of California, First Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed, with interest from the date of the rendition of said decree and with costs in favor of the appellee and against the appellant.

It is further ordered, adjudged and decreed by this Court, that the appellee recover against the appellant for his costs herein expended, and have execution therefor.

[Endorsed]: Decree, as Amended Pursuant to Order Entered February 26, 1919. Vacated and Set Aside Pursuant to Order Entered October 9, 1919. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk. Filed and entered February 3, 1919. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

At a stated term, to wit, the October Term, A. D. 1918, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Wednesday the twenty-sixth day of February, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable ERSKINE M. ROSS, Circuit Judge; The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3195.

WESTERN FUEL COMPANY, a Corporation,
Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Appellee.

Order Amending Decree.

Upon motion of Mr. Henry Heidelberg, counsel for the appellee, and good cause therefor appearing, ORDERED decree of this Court filed and entered February 3, 1919, be amended by adding thereto the provision that interest be allowed from the date of the rendition of the decree of the said District Court.

At a stated term, to wit, the October Term, A. D. 1918, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the twentieth day of May, in the year of our Lord one thousand nine hundred and nineteen. Present, The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable ERSKINE M. ROSS, Circuit Judge; The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3195.

WESTERN FUEL COMPANY, a Corporation,
Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Appellee.

Order Granting Petition for Rehearing, etc.

On consideration thereof, and by direction of the Honorable William B. Gilbert, Erskine M. Ross and William H. Hunt, Circuit Judges, before whom the case was heard, it is ORDERED that the petition, filed March 5, 1919, on behalf of the appellant for a rehearing in the above-entitled cause be, and hereby is granted.

It is FURTHER ORDERED that the above-entitled cause be assigned for hearing on May 26, 1919.

At a stated term, to wit, the October Term, A. D. 1918, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the twenty-sixth day of May, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable ERSKINE M. ROSS, Circuit Judge; The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3195.

WESTERN FUEL COMPANY, a Corporation,
Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Appellee.

Order of Submission on Rehearing.

ORDERED appeal in the above-entitled cause, on rehearing, argued by Mr. Hartley F. Peart, counsel for the appellant, and by Messrs. Chris. M. Bradley and Henry Heidelberg, counsel for the appellee, and submitted to the Court for consideration and decision, with leave to respective counsel to file typewritten supplemental briefs within five (5) days from date.

At a stated term, to wit, the October Term, A. D. 1919, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the sixth day of October, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable ERSKINE M. ROSS, Circuit Judge; The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3195.

WESTERN FUEL COMPANY, a Corporation,
Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Appellee.

Order Directing Filing of Opinion on Rehearing.

By direction of the Honorable William B. Gilbert, Erskine M. Ross, and William H. Hunt, Circuit Judges, before whom the cause on rehearing was heard, ORDERED that the typewritten opinion this day rendered by this Court in the above-entitled cause on said rehearing, be forthwith filed by the clerk.

It is FURTHER ORDERED that the Decree of this Court, filed and entered on February 3, 1919, be vacated and set aside, and that a Decree be filed and entered in accordance with the opinion this day filed.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3195.

WESTERN FUEL COMPANY, a Corporation,
Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Appellee.

Opinion on Rehearing.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge:

The case was stated when last under consideration here (255 Fed. 817), which statement need not be repeated.

The numerous preceding and conflicting decisions of both Federal and State courts with respect to the provisions of state statutes at variance with the general maritime law in suits for personal injuries were finally disposed of by the decision of the Supreme Court in the case of Southern Pacific Co. vs. Jensen, 244 U. S. 205, so that we think it unnecessary to make further reference to those cases. The Jensen case grew out of the alleged wrongful death of a person, a right of action for which was given by a state statute. The later case in the same court of Chelentis vs. Luckenbach S. S. Co., 247 U. S. 372, grew out of personal injuries not resulting in death, but in

neither of those decisions of the Supreme Court was the slightest distinction made between cases for wrongful death and those for personal injury not resulting in death. It is clear, we think, that no such distinction exists, and that a right of action not given by admiralty but by a state statute, while enforceable in a court of admiralty under the law as established by the Supreme Court in the cases above cited and by other of its decisions there referred to, will be enforced only in accordance with the recognized principles of the maritime law. Regarding that question we are entirely satisfied of the correctness of our former decision in the present case. The error into which we then fell grew out of our not treating the deceased Souza and the winch-driver and hatch-tender, through whose negligence the accident occurred, as fellow-servants. That they were such fellow-servants, for which reason the appellant cannot be held responsible, was decided in a similar case by this court in The Hoquiam, 253 Fed. 627. See, also, the similar decision of this court in the case of Olson vs. Oregon Coal & Navigation Co., 104 Fed. 574, and the cases there cited.

We see no escape from the conclusion that the judgment appealed from must be reversed with directions to the court below to dismiss the action at the cost of the libelant, and it is so ordered.

[Endorsed]: Opinion. Filed Oct. 6, 1919. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3195.

WESTERN FUEL COMPANY, a Corporation,
Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Appellee.

Decree U. S. Circuit Court of Appeals.

Appeal from the Southern Division of the District Court of the United States for the Northern District of California, First Division.

This cause came on to be heard on the Transcript of the Record from the Southern Division of the District Court of the United States for the Northern District of California, First Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed, with costs in favor of the appellant and against the appellee and that this cause be and hereby is remanded to the said District Court, with directions to said District Court to dismiss the action at the cost of the libelant.

It is further ordered, adjudged and decreed by this Court, that the appellant recover against the appellee for its costs herein expended, and have execution therefor.

[Endorsed]: Decree, Vacated Pursuant to Order Entered October 30, 1919. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk. Filed and entered October 6, 1919. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

At a stated term, to wit, the October Term, A. D. 1919, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Thursday, the thirtieth day of October, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable WILLIAM W. MORROW, Circuit Judge; The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3195.

WESTERN FUEL COMPANY, a Corporation,
Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Appellee.

Order Granting Petition for Rehearing, Vacating Decree, and Certifying Certain Questions to the Supreme Court of the United States.

By direction of the Honorable William B. Gilbert, and William H. Hunt, Circuit Judges, ORDERED

petition, filed October 17, 1919, on behalf of the appellee for a rehearing after decision on rehearing of the above-entitled cause be, and hereby is granted and that the decree of this court filed and entered on October 6, 1919, be, and is hereby vacated and set aside, and that the certificate of this court certifying certain questions of propositions of law to the Supreme Court of the United States be filed, and that a certified copy thereof be forwarded to the clerk of said Supreme Court for filing, etc.

Ross, Circuit Judge, before whom, together with the Honorable Wm. B. Gilbert and William H. Hunt, Circuit Judges, the cause was heard, dissents from the order granting the petition for rehearing and vacating and setting aside the said decree.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3195.

WESTERN FUEL COMPANY (a Corporation),
Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Appellee.

Upon Appeal from the United States District Court, Northern District of California, Southern Division.

Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, Certifying Certain Questions or Propositions of Law to the Supreme Court of the United States Under Section 239, Judicial Code.

Before GILBERT, ROSS and HUNT, Circuit Judges.

This cause came to the Circuit Court of Appeals for the Ninth Circuit upon an appeal from the United States District Court for the Northern District of California, Southern Division, from a judgment in favor of the appellee, as libelant in that court, against the appellant, as libelee in that court, for the sum of $10,000. The cause was a libel in admiralty for damages for wrongful death.

Manuel Souza, a citizen and resident of California, was killed while in the employment of Western Fuel Company, a corporation of California, working in the hold of the steamship "Tancred," which was unloading at the bunkers of Western Fuel Company, in Oakland, California. This occurred on August, 5, 1916. The deceased employee left him surviving a widow and five minor children.

On August 24, 1916, the widow of Manuel Souza made an application for adjustment of a claim presented by her against the Western Fuel Company to the Industrial Accident Commission of the State of California under the Workmen's Compensation, Insurance and Safety Act of California, (Chapter 176, Laws of 1913, Stats. 1913, page 279). The State

Industrial Accident Commission made an award favorable to the widow. The matter was taken to the Supreme Court of California for review, and on August 6, 1917, the award made by the State Industrial Accident Commission was annulled as having been made without jurisdiction, in view of the decision of the Supreme Court of the United States in the case of Southern Pacific Company vs. Marie Jensen, 244 U. S. 205.

Thereafter, to wit, on August 21, 1917, this cause was initiated by the filing of a libel for damages for wrongful death in the District Court of the United States for the Northern District of California, Southern Division.

In this cause the appellee relies upon the provisions of the statutes of the State of California giving a right of action for wrongful death and modifying in very substantial particulars the common law defenses of assumption of risk, negligence of a fellow-servant and contributory negligence in cases where the relationship of employer and employee is involved. (Section 377, Code of Civil Procedure and Section 1970 of the Civil Code of California.)

The District Court, rendering its decree, applied the law as expressed in the California Code provisions above cited, having reference also to a state statute known as the "Roseberry Act" of 1911 (Chapter 399 of the Laws of 1911; Stats. 1911, page 796), Section 1 of which abolishes the doctrine of assumption of risk and the defense of negligence of a fellow-servant, and found, to which this Court agrees, that the death of Souza was caused by the negligence

of a fellow-servant and held that the Roseberry Act of 1911 warrants recovery by the appellee herein because it does away with the doctrine of assumption of risk and the defense that the accident was caused by the negligence of a fellow-servant.

Questions of law concerning which the Circuit Court of Appeals of the Ninth Circuit desires the instructions of the Supreme Court are:

1. Are the statutes of the State of California, conferring the right of action for wrongful death, to be applied in libels in admiralty for wrongful death?

2. If the state statutes do apply, are they to be applied with all their incidents abolishing or modifying the common-law defenses of assumption of risk, contributory negligence and the negligence of a fellow-servant, or

3. Does the state statute merely give the right of action and leave for application the rules of maritime law covering personal injuries, thus doing away with any distinction heretofore recognized between actions for personal injuries not resulting in death and actions for wrongful death sanctioned by state statutes?

WM. B. GILBERT,
ERSKINE M. ROSS,
WM. H. HUNT,
Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated San Francisco, Cal., October 30th, 1919.

[Endorsed]: Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, Certifying Certain Questions or Propositions of Law to the Supreme Court of the United States Under Section 239, Judicial Code. Filed October 30, 1919. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3195.

WESTERN FUEL COMPANY, a Corporation,
Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Record Certified Under Section 2 of Rule 37 of the Rules of the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing two hundred and thirteen (213) pages, numbered from and including 1 to and including 213, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, including Libellant's Exhibits "A" and "C" and Libellee's Exhibits 1 and 2, and certified under section 2 of Rule 37 of the rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, this 15th day of December, A. D. 1919.

[Seal]

F. D. MONCKTON,
Clerk.

By Paul P. O'Brien,
Deputy Clerk.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Western Fuel Company is appellant, and Antone Garcia, as Administrator of the Estate of Manuel Souza, deceased, is appellee, No. 3195, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Northern District of California, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the thirty-first day of March, in the year of our Lord one thousand nine hundred and twenty-one.

JAMES D. MAHER,
Clerk of the Supreme Court
of the United States.

[Endorsed:] File No. 27,444. Supreme Court of the United States, October Term, 1920. No. 229. Western Fuel Company vs. Antone Garcia, as Administrator, etc. Writ of Certiorari. Docketed. No. 3195. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 13, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk. Received Apr. 2, 9.04 a. m., '21, New York.

——— ———.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3195.

WESTERN FUEL COMPANY, a Corporation, Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased, Appellee.

Stipulation as to Return to Writ of Certiorari.

It is hereby stipulated and agreed by and between Western Fuel Company, a corporation, appellant, and Antone Garcia, as administrator of the estate of Manuel Souza, deceased, appellee, that the certified transcript of the record now on file in the Supreme Court of the United States and the original exhibits sent up with said certified transcript of record in that certain cause therein pending, entitled "Western Fuel Company, a corporation, appellant, vs. Antone Garcia, as Administrator of the Estate of Manuel Souza, deceased, appellee," and numbered 689, shall stand and be considered as the return to the writ of certiorari heretofore granted by the Supreme Court of the United States in the above entitled cause in said court, and dated the 31st day

of March, 1921, and filed herein on the 13th day of April, 1921.

Dated: April 20, 1921.

(Sgd.) HARTLEY F. PEART,
(Sgd.) IRA S. LILLICK,
Counsel for Appellant.
(Sgd.) HENRY HEIDELBERG,
(Sgd.) CHRISTOPHER M. BRADLEY,
Counsel for Appellee.

[Endorsed:] Stipulation as to Return to Writ of Certiorari. Filed April 23, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3195.

WESTERN FUEL COMPANY, a Corporation, Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased, Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Stipulation as to Return to Writ of Certiorari from the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Cir-

cuit, do hereby certify the preceding page to be a full, true and correct copy of a "Stipulation as to Return to Writ of Certiorari," filed in the above entitled cause on the 23d day of April, A. D. 1921, as the original thereof remains on file and of record in my office.

ATTEST my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 23d day of April, A. D. 1921.

[United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk,
By PAUL P. O'BRIEN,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3195.

WESTERN FUEL COMPANY, a Corporation, Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased, Appellee.

Return to Writ of Certiorari.

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of said Court, in obedience to the annexed writ of certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send, without delay, to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said Writ and send to the said Supreme Court a certified copy of a "Stipulation of Counsel Relative to Return to Writ of Certiorari," in which said stipulation it is pro-

vided that the certified Transcript of Record and exhibits heretofore filed by the appellant in said cause in the said Supreme Court as a part of its petition for a Writ of Certiorari may be taken as the Return to the said Writ of Certiorari, the original of which stipulation was filed in my office on the 23d day of April, A. D. 1921.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 23d day of April, A. D. 1921.

[Seal of United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk,
By PAUL P. O'BRIEN,
Deputy Clerk.

[Endorsed:] File No. 27,444. Supreme Court U. S., October Term, 1920. Term No. 229. Western Fuel Co., Petitioner, vs. Antone Garcia, as Adm'r, etc. Writ of certiorari and return. Filed April 28, 1921.

FILED
SEP 24 1921
JAMES D. MAHER
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1921.

No. 28.

WESTERN FUEL COMPANY, A CORPORATION,
Petitioner,

against

ANTONE GARCIA, AS ADMINISTRATOR OF THE ESTATE OF MANUEL SOUZA, DECEASED,
Respondent.

BRIEF FOR PETITIONER.

JOSEPH F. MURRAY,
Counsel.

The Evening Post Job Printing Office, Inc., 154 Fulton St., N. Y.

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Supreme Court of the United States,

OCTOBER TERM, 1921.

WESTERN FUEL COMPANY, a Corporation,
Petitioner,

AGAINST

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, deceased,
Respondent.

No. 28.

BRIEF FOR PETITIONER.

Statement.

This case is here upon Writ of *Certiorari* to the United States Circuit Court of Appeals for the Ninth Circuit.

Facts.

Manuel Souza while engaged in unloading coal from the Steamer *Tancred* on August 5, 1916, was killed by falling coal. The steamer, which was a Norwegian vessel under charter to the Western Fuel Company, was at anchor in Oakland Creek, a navigable tributary of the Bay of San Francisco.

Two gangs were engaged in the unloading of the boat, each gang consisting of an engineer, a dump-

man, a hatch-tender and stevedores who filled the buckets in the hold (pp. 64, 78, 91, 92).

Costa was the hatch-tender for one gang and Duarte hatch-tender for the other (pp. 58, 64, 95). Souza was a member of the same gang with Duarte and at the time of the accident that gang was getting ready to go to work and the other gang was getting ready to quit (pp. 64, 96, 98). Souza, however, had gone to work a little ahead of time in order to take the place of a friend of his in the other gang, so that the latter might change his clothes (p. 86).

It was the duty of the hatch-tender to watch the loading of the bucket, and when it had been completed to signal the engineer and to watch thereafter so that if any coal fell from the bucket or the hopper or anything else went wrong he might warn the workmen in the hold (pp. 58, 60, 63, 68, 69, 92, 118).

The hoisting engineer was stationed in a tower about 70 or 80 feet above the deck of the steamer and at a signal from the hatch-tender applied the electric power to raise the bucket (p. 117). The engineer in the gang that was working at the time was Hayes. The dump-man stood near the hopper about 70 feet above the deck of the steamer, and when the bucket was over the hopper he would pull a clutch which would cause the bucket to dump (p. 103).

When the workmen in the hold had filled a bucket with coal the hatch-tender would signal to the hoisting engineer, and the engineer would then apply the electric power which would lift the bucket from the hold perpendicularly to the yard arm which extended from the side of the bunker, where the bucket would hang suspended by ten or twelve feet of cable from the yard arm (pp. 57, 109, 117,

118, 144). The engineer would then release an automatic brake which would cause the bucket to run in on a carrier by means of gravity to a position over the hopper (p. 118). The hopper extended out about twelve feet from the side of the bunker, and had a lip about eight feet wide. The bucket, about 3½ feet square and about 3 feet high, cleared the lip of the hopper by about 2 feet and swung in about 6 feet from the lip (pp. 107, 108, 110, 119). When the bucket reached its proper position the dump-man standing on a plank at the top of the hopper would pull a clutch which was attached to the bucket, and the contents of the bucket would then empty into the hopper (pp. 103, 109). Nelson was the dump-man in the gang working at the time of the accident.

The hoisting machinery in use at the time of the accident had been installed some four or five months prior thereto and was the most modern and best adapted for the purpose known, and the equipment was in good order (p. 143). No contention is made that there was any negligence on the part of the petitioner in the equipment or its condition.

Immediately prior to the accident a bucket had been filled, and had been attached to the cable; Costa had signaled Hayes, the engineer, and the bucket had been hoisted (pp. 60, 63). When it had reached its position over the hopper Nelson pulled the clutch and, according to the testimony of one of the witnesses for the respondent, as the dump-man pulled the clutch the bucket started back on the carrier and half of the coal fell in the hopper and half outside (pp. 74, 75, 78, 79). Part of that which fell outside struck and killed Souza who was in the hold of the ship.

This bucket hanging from the yard-arm by a twelve foot cable has a certain amount of swing

to it, and Nelson and Hayes testified that as the clutch was pulled the bucket swung half way around causing some of the coal to fall outside of the hopper (pp. 106-109, 110, 121, 139, 140).

It is impossible for the bucket when it has reached its position above the hopper to start back unless the engineer moves it by means of electricity (p. 125). Hayes testified that he had not moved the bucket and as this was the last one to be emptied on his shift, there was no occasion for him to move it (pp. 120, 124, 126).

All the witnesses agreed that coal is constantly falling either from the bucket or the hopper, and that the work is dangerous, but no one had ever seen such a large amount of coal fall before (pp. 69, 70, 87, 92, 97, 98). Souza had worked at unloading coal for years and had on many occasions acted as hatch-tender looking out for the bucket, watching for falling coal and warning the members of the gang in such event (pp. 66, 87, 88). Costa, the hatch-tender at the time of the accident, was in the hold instead of being above and he could not see what was going on, but as he testified, "There was a man that was working for me who hollered ahead of time and they couldn't get away" (pp. 59, 88).

Issues.

The respondent's cause of action was based upon the Statutes of the State of California giving a right of action for wrongful death (Section 377, Code of Civil Procedure; Section 1970 of Civil Code of California.

Code of Civil Procedure, Section 377, is as follows:

> "Section 377. When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal rep-

resentatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

Section 1970 of the Civil Code reads as follows:

"Section 1970. An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee, or unless the employer has neglected to use ordinary care in the selection of the culpable employee; provided nevertheless, that the employer shall be liable for such injury when the same results from the wrongful act, neglect, or default of any agent or officer of such employer, superior to the employee injured, or of a person employed by such employer having the right to control or direct the services of such employee injured, and also when such injury results from the wrongful act, neglect or default of a co-employee engaged in another department of labor from that of the employee injured, or employed upon a machine, railroad train, switch-signal point, locomotive-engine, or other appliance than that upon which the employee who is injured is employed, or who is charged with dispatching trains, or transmitting telegraphic or telephonic orders upon any railroad, or in the operation of any mine, factory, machine-shop, or other industrial establishment.

"Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such employer shall not be a bar to recovery for any injury or death caused thereby, unless it shall also appear that such employee fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures, and thereafter consented to use the same, or continued in the use thereof.

"When death, whether instantaneous or otherwise, results from an injury to an employee received as aforesaid, the personal representatives of such employee shall have a right of action therefor against such employer, and may recover damages in respect thereof, for and on behalf, and for the benefit of the widow, children, dependent parents, and dependent brothers and sisters, in order or precedence as herein stated, but no more than one action shall be brought for such recovery.

"Any contract or agreement, express or implied, made by any such employee to waive the benefits of this section, or any part thereof, shall be null and void, and this section shall not be construed to deprive any such employee or his personal representative, of any right or remedy to which he is now entitled under the laws of this state.

"The rules and principles of law as to contributory negligence which apply to other cases shall apply to cases arising under this section, except in so far as the same are herein modified or changed."

In 1911 the California legislature passed the so-called Roseberry Act (Stats. 1911, p. 796), which provides in part:

"Section 1. In any action to recover damages for a personal injury sustained within this state by an employee while engaged in the line

of his duty or the course of his employment as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent, or servant of the employer, the fact that such employee may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee, and it shall be conclusively presumed that such employee was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employees contributed to such employee's injury; and it shall not be a defense:

"(1) That the employee either expressly or impliedly assumed the risk of the hazard complained of.

"(2) That the injury or death was caused in whole or in part by the want of ordinary or reasonable care of a fellow-servant.

"Section 2. No contract, rule or regulation, shall exempt the employer from any of the provisions of the preceding section of this act."

The pertinent sections of the Statute of Limitations of the State of California are in the Code of Civil Procedure.

Section 340, Subdivision 3, is as follows:

"Within One Year:

"3. An action for libel, slander, assault, battery, false imprisonment, seduction or for injury to or for the death of one caused by the wrongful act or neglect of another or by a depositor against a bank for the payment of a forged or raised check."

Section 355, is as follows:

> "If an action is commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, the plaintiff, or if he die and the cause of action survive, his representatives, may commence a new action within one year after the reversal."

The respondent claimed that Section 1970 of the Civil Code and the Roseberry Act, the first of which took away the fellow servant defense under certain circumstances, and the latter of which abolished the defenses of assumption of risk, negligence of a fellow servant and contributory negligence, should be applied. The petitioner contended to the contrary.

The District Court in rendering its decree applied the provisions of the statutes above quoted, except the statute of limitations, particularly the Roseberry Act, which abolishes the doctrine of assumption of risk and the defense that the accident was caused by the negligence of a fellow servant.

Proceedings.

The accident and death of Souza occured August 5, 1916. April 25, 1917, the Industrial Accident Commission of the State of California, after proceedings taken before it, made an award in favor of Mary Souza, the widow, against the Western Fuel Company for a certain sum of money, from which award the Western Fuel Company sued out a petition for writ of review by the Supreme Court of the State of California, which said court on August 6, 1917, made an order annulling and setting aside such award (p. 51). August 21, 1917, the widow and the children of the deceased by their guardian *ad litem* filed their libel in the District

Court of the United States for the Southern Division of the Northern District of California, First Division (p. 12). Libelee filed exceptions thereto which were overruled, Judge Rudkin filing a memorandum thereon (p. 22).

March 15, 1918, Antone Garcia, as administrator of the estate of Manuel Souza, deceased, filed his "first amended" libel against the Western Fuel Company and the other libelees named (p. 32). The petitioner filed exceptions to the first amended libel which were overruled by Judge Dooling in ordering a decree for the respondent. Upon rendering his opinion and order for decree in favor of the respondent, the judge of the District Court gave permission to the respondent to amend said amended libel by including the averments that the hatch-tender was negligent and that the accident was also due to such negligence. The case was ordered dismissed as to the libelees Nelson and Weisel and decree in favor of Garcia as administrator in the sum of $9,560 was entered May 13, 1918.

On appeal, the Circuit Court of Appeals affirmed the decree, but held that though a court of admiralty will enforce a right of action for death given by a state statute, it will enforce it in accordance with the recognized principles of maritime law unaffected by the provisions of any state or local law (*Western Fuel Company* vs. *Garcia,* 255 Fed. 817) (p. 198).

A re-hearing in the Circuit Court of Appeals was thereafter had upon motion of the petitioner, and after such re-hearing the Court of Appeals vacated the decree affirming the decree of the District Court, reversed the decree of the District Court and ordered the District Court to dismiss the action on the ground that the death was caused by the neg-

ligence of a fellow-servant, but stated that in all other respects the Court was satisfied with the correctness of its former decision (*Western Fuel Company* vs. *Garcia*, 260 Fed. 839) (p. 206). Thereafter the respondent applied for a re-hearing and thereupon the Circuit Court of Appeals, with Circuit Judge Ross dissenting, vacated and set aside its decree reversing the judgment and certified the following questions to this court:

(1) Are the statutes of the State of California, conferring the right of action for wrongful death, to be applied in libels in admiralty for wrongful death?

(2) If the state statutes do apply, are they to be applied with all their incidents abolishing or modifying the common law defenses of assumption of risk, contributory negligence and the negligence of a fellow servant, or

(3) Does the state statute merely give the right of action and leave for application the rules of maritime law covering personal injuries, thus doing away with any distinction heretofore recognized between actions for personal injuries not resulting in death and actions for wrongful death sanctioned by state statutes? (pp. 210-212).

In March, 1920, the petitioner herein petitioned this court for a Writ of *Certiorari* to the United States Circuit Court of Appeals for the Ninth Circuit, and this petition was denied.

On March 18, 1921, the questions certified by the Court of Appeals were argued before this Court, and on March 21, 1921, this Court entered an order granting a Writ of *Certiorari* to the Circuit Court of Appeals and restored the case to the docket for re-argument.

The petitioner contends:

1. That the California statute of limitations bars a recovery and that the District Court erred in not applying the statute. This question was raised by paragraphs 2 and 4 of the Assignment of Errors (pp. 172, 173).

2. That the California statutes abolishing the defenses of assumption of risk and negligence of a fellow servant have no application in admiralty, and that the District Court erred in applying them. This question was raised by paragraphs 22 and 23 of the Assignment of Errors (p. 176).

3. That the death of Souza was caused by the negligence of fellow servants and that therefore there can be no recovery. This question was raised by paragraphs 11 and 19 of the Assignment of Errors (pp. 174, 175).

POINT I.

This action, not having been commenced until more than one year after decedent's death, is barred by the California Statute of Limitations.

In *The Harrisburg*, 119 U. S. 199, it was held that where state statutes give a cause of action for wrongful death and the time within which such an action may be brought is limited by the same statutes admiralty although enforcing the right will also observe the limitation. In that case the steamer belonged to the Port of Philadelphia, and the death occurred in waters within the State of Massachusetts. The Statutes of Pennsylvania gave

a right of action for wrongful death, but limited the time within which the action might be brought to one year after the death. The Statutes of Massachusetts penalized a corporation which caused wrongful death by a fine to be recovered by indictment. The statutes provided that such indictment should be prosecuted within one year after the injury causing the death. The action in the case was not brought within one year, and this court said:

> "The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year, and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right."

In that case the liability and the remedy in Pennsylvania were created by the act of the year 1851 and the limitation was created by the act of 1855. The liability and the remedy in this case are found in the same statutes, Section 377 of the Code of Civil Procedure and Section 1970 of the

Civil Code, and the limitation here is found in Section 340 of the Code of Civil Procedure. Therefore it would seem to follow that the limitation in this case is not only of the remedy, but of the right.

In the later case of *Davis* vs. *Mills*, 194 U. S. 451, the plaintiff sued in a state other than Montana to recover upon a right given by a Montana statute, which provided that if a corporation failed to file a specified report, the trustees of the company should be liable for the debts of the company. In the Code of Civil Procedure of Montana, under a title dealing with the time of commencing actions, it was provided by Section 554 as follows:

> "This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached or the liability created (*Sic*)."

The action was not brought within three years, and the defendants interposed the defense that Section 554 barred the action. In considering that defense, Mr. Justice Holmes in writing for the Court said:

> "The general theory on which an action is maintained upon a cause which accrued in another jurisdiction is that the liability is an obligation which having been attached to the person by the law then having that person within its power, will be treated by other countries as accompanying the person when brought before their courts. But, as the source of the obligation is the foreign law, the defendant, generally speaking, is entitled to the benefit of whatever conditions and limitations the foreign law creates. *Slater* vs. *Mexican*

Natl. R. Co., 194 U. S. 120. It is true that this general proposition is qualified by the fact that the ordinary limitations of actions are treated as laws of procedure, and as belonging to the *lex fori*, as affecting the remedy only, and not the right. But in cases where it has been possible to escape from that qualification by a reasonable distinction, courts have been willing to treat limitations of time as standing like other limitations, and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability, and in the same section or the same act limits the time within which it can be enforced, whether using words of condition or not. *The Harrisburg*, 119 U. S. 199, 30 L. Ed. 358, 7 Sup. Ct. Rep. 140. But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right.

"If, then, the only question were one of construction and as to liabilities subsequently incurred it would be a comparatively easy matter to say that paragraph 554 of the Montana Code of Civil Procedure qualifies the liability imposed upon directors by paragraph 451 of the Civil Code, and creates a condition to the corresponding right of action against them, which goes with it into any jurisdiction where the action may be brought."

The right of action here is given by Section 377 of the California Code of Civil Procedure and by Section 1970 of the Civil Code. Title 2 of the Code of Civil Procedure is entitled "Time of Commencing

Civil Actions". Chapter 1 of that title, Section 312, provides:

> "Civil actions, without exception, can only be commenced within the periods prescribed by this title, after the cause of action shall have accrued."

Chapter 3 of that title, Section 340, provides:

> "Within one year— * * * 3. An action for libel, slander, assault, battery, false imprisonment, seduction, or other injury to, or for the death of one caused by the wrongful act or neglect of another."

If the limitation contained in Section 554 of the Montana Code of Civil Procedure was directed to the liability created in Section 451 of the Civil Code so specifically as to warrant saying that it qualified the right, then we submit that the limitation contained in Section 340 of the California Code of Civil Procedure in the same way qualifies the right of action given by Section 377 of the same Code and by Section 1970 of the Civil Code.

The respondent alleged the proceedings taken before the Industrial Accident Commission, and that through writ of review at the instance of the petitioner, the award of the Commission was annulled on August 3, 1917. The accident and death of Souza happened on August 5, 1916, and the original libel brought by the heirs of Souza was filed August 31, 1917. The first amended libel brought by the administrator was not filed until the 15th day of March, 1918, three days before the trial of this action. We do not believe that the respondent can be relieved of the bar of the statute

of limitations by Section 355 of the Code of Civil Procedure. That Section reads as follows:

> "If an action is commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, the plaintiff, or, if he die and the cause of action survive, his representatives, may commence a new action within one year after the reversal."

This section was construed in the case of *Fay* v. *Costa*, 2 Cal. App. 241, wherein it was held in passing upon this very question of statute of limitations, that an annulling on a writ of review is not a reversal on appeal within the meaning of Section 355. The Court said:

> "The judgment in question here was not 'reversed on appeal', but was annulled and set aside on a writ of review and in order to uphold the action of the trial court we are asked to hold that a reversal on appeal includes an annulling on a writ of review * * * Our code, in the section just cited (C. C. P., Section 1066) uses the word 'appeal' as indicating something different from a writ of review. While to some minds it may be difficult to suggest a reason why the legislature, in the case of a reversal on appeal, should provide that a new action may be brought, and not when the same result is secured by a writ of review, it seems to be so written. * * * We do not think that we are justified in construing the word 'appeal' as used in Section 355 of the Code of Civil Procedure, as including a writ of review. For the reasons above set forth, the demurrer should have been sustained."

Petition for rehearing in that case was denied in the District Court of Appeal on December 21, 1905, and a petition to have the cause heard in the Supreme Court, after judgment in the District

Court of Appeal, was denied by the Supreme Court on January 22, 1906.

If these statutes should be applied in this case they will be given the same construction and effect which are given them by the state courts.

Bauserman v. *Blunt,* 147 U. S. 647;
Andrew v. *Redfield,* 98 U. S. 158.

The respondent plainly bases his excuse for failing to bring the action seasonably upon the proceedings which were improperly taken before the Industrial Accident Commission, but under the decision last quoted it is shown that reliance upon Section 355 is ill-founded.

Just as in the case of *Fay* vs. *Costa,* there was no appeal, but the award in favor of Mrs. Souza was annulled by writ of review, the only remedy available to the Western Fuel Company in the state courts.

In his opinion Judge Dooling on this subject says (Apostles, p. 160):

> "As the beneficiaries here were for a year engaged in the prosecution of their supposed rights under the Workman's Compensation Act, their delay in bringing the present action is accounted for so as to remove the bar of limitations. *Fill* v. *Cunard Co.,* 217 Fed. 84."

If this authority is to be relied upon as establishing the principle that excuse existed for the delay in resorting to the admiralty court by reason of the pendency of the proceedings before the Industrial Accident Commission and the state court, nevertheless there is an entire failure to excuse the commencement of the action by the proper party, viz., the administrator. This was specifically attacked in the exceptions filed to the first amended libel.

Circuit Judge Ross in writing for the Circuit

Court of Appeals in this case stated that since the right of action for death given by the state statute would be enforced by a Court of Admiralty in accordance with the recognized principles of Maritime Law unaffected by the provisions of any state or local law, therefore,

> "The California statute of limitations of one year relied upon by the appellant in bar of the action, has no more application to the case than had the California statute of frauds involved in the case of the *Union Fish Company* vs. *Erickson, supra*, just decided by the Supreme Court."

That case, however, is not at all in point. There Erickson made an oral contract to serve for a year as master of a vessel in Alaska and he sued in Admiralty for wrongful discharge. The libellee set up as a defence the California Statute of Frauds. This Court said:

> "In entering into this contract the parties contemplated no services in California. They were making an arrangement for the services of the master of the vessel, the duties to be performed in the waters of Alaska, mainly upon the sea. The maritime law controlled in this respect, and was not subject to limitation because the principal engagement happened to be made in California. The parties must be presumed to have had in contemplation the system of maritime law under which it was made."

In that case the plaintiff's right of action did not depend upon any state law, as it was a maritime contract, but was given the right of action by Admiralty itself. Here, however, we have a case where the plaintiff's right of action does depend upon the state law and Admiralty would not grant any relief if it were not for the state law.

POINT II.

State statutes fixing the liabilities of parties in tort actions will not be applied in admiralty.

By Article 3, Section 2 of the Constitution of the United States, the judicial power of the United States was extended to all cases of admiralty and maritime jurisdiction, and by Section 8 of Article 1 of the Constitution, Congress was given power to make all laws necessary and proper for carrying out all powers granted by the Constitution to the Federal Government. Pursuant to the power granted to it to make necessary and proper laws, Congress by Section 9 of the Judiciary Act of 1789, gave to the District Courts of the United States "exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction * * * saving to suitors in all cases the right of a common law remedy where the common law is competent to give it".

By Section 34 of the same act, now Revised Statutes Section 721, Congress provided:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in Courts of the United States where they apply."

This section has been construed to mean that whenever any state has enacted any legislation which is not unconstitutional or in conflict with a Federal Statute, that legislation is binding upon the Federal Courts sitting within that state in trials at common law. Congress by specifying trials at com-

mon law as the only ones in which state laws should be the rules of decision just as effectively showed its intention that state laws should not be rules of decision in admiralty as if it had included in the section a specific provision to that effect. Such is the construction to be given the section under the maxim, *expressio unius est exclusio alterius.*

In *Dourousseau* v. *United States,* 6 Cranch 307, 314, in construing the Constitution and Judiciary Act, Chief Justice Marshall said:

> "When the first legislature of the Union proceeded to carry the third article of the Constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the Supreme Court. They have not, indeed, made these exceptions in express terms. They have not declared that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.
>
> The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent.
>
> It is upon this principle that the court implies a legislative exception from its constitutional appellate power in the legislative affirmative description of those powers."

In *Ex Parte McCardle,* 7 Wall. 506, the court speaking of the Dourousseau case said: "The principle that the affirmative of appellate jurisdiction implies the negation of all such jurisdiction not affirmed" has been established.

In *Tucker* v. *Alexandroff*, 183 U. S. 424, 436, the court said:

> "Upon general principles applicable to the construction of written instruments, the enumeration of certain powers with respect to a particular subject-matter is a negation of all other analogous powers with respect to the same subject matter."

See also *In Re Heath*, 144 U. S. 92, 93.

There can be no question of the applicability of that rule of construction to this statute. Congress purposely excluded trials in admiralty from the operation of this statute so that the rights of litigants in courts of admiralty should be uniform and equal and not subject to the varying whims and ideas of the legislators of the different states; so that a claimant's right to relief might not be limited by restrictive laws of any State legislature and so that the respondent might not be deprived of his recognized defenses.

In the same Judiciary Act, in what are now Sections 913 and 914 of the Revised Statutes, Congress expressly provided that not even the practice, forms or proceedings in admiralty should be the same as those in State courts. By these several statutes Congress showed unmistakably that courts of admiralty were to be independent of all state laws and decisions.

The only case of a maritime tort which we have been able to find in which any mention is made of Section 34 of the Judiciary Act is the case of *American Steamboat Co.* v. *Chase*, 83 U. S. 522, 534, in which the court said:

> "Different systems of pleading and modes of proceeding, and different rules of evidence prevail in the two jurisdictions, but whether the party elects to go into one or the other, he

> must conform to the system of pleading and to the rules of practice, and of evidence, which prevail in the chosen forum. State statutes, if applicable to the case, constitute the rules of decision in common law actions, in the circuit courts as well as in the state courts, but the rules of pleading, practice and of evidence in the admiralty courts are regulated by the admiralty law as ultimately expounded by the decisions of this court. State legislatures may regulate the practice, proceedings and rules of evidence in their own courts, and those rules, under the 34th section of the judiciary act, become, in suits at common law, the rules of decision, where they apply, in the circuit courts."

This might permit an argument that only the rules of pleading, practice and of evidence in the admiralty courts are regulated by the admiralty law and that when the laws of the several states are mentioned in Section 34, only state laws regulating practice, pleading and rules of evidence are meant. However, the section has not been construed so narrowly and we do not believe it necessary to cite more than a few cases to show that state laws affecting the rights and liabilities of the parties are included.

Bucher v. *Cheshire R. R. Co.,* 125 U. S. 555;
Detroit v. *Osborne,* 135 U. S. 499;
McClaine v. *Rankin,* 197 U. S. 154.

Moreover, any such argument is rebutted when consideration is given to the court's statement earlier in the opinion that "the remedy, in the two jurisdictions, is without any substantial difference." It is true that in those days the rules of liability were practically the same except as to the effect which contributory negligence had upon

the right of the claimant to recover. The rule that contributory negligence would not defeat a recovery had always been recognized in admiralty, whereas in actions at common law contributory negligence barred a recovery.

Max Morris, 137 U. S. 1;
Belden v. *Chase,* 150 U. S. 674;
Atlee v. *Northwestern Packet Co.,* 88 U. S. 389.

It was because the great difference in the two jurisdictions at that time lay in the practice, pleadings and rules of evidence that the court made such slight reference to the difference in the remedies. At that time it was difficult to foresee what drastic changes would be made in the common law rules of liability by the various State Legislatures. Such changes have been made in the case of employer and employee that few, if any, of the rules at common law respecting the liabilities of the two parties are at present applicable. If it had been possible to foresee those changes which would result in taking away the substantial defenses of the employer, we refuse to believe that the court would have been satisfied to point out specifically the difference in the pleadings, practice and evidence and pass the question of the difference in the rules of liability in such an offhand manner.

We have been unable to find any case where Section 721 has been construed or any effect given it in an action in Admiralty. This is doubtless due to the fact that there never had been any doubt, particularly prior to the enactment of the death statutes, that in an action in admiralty, admiralty rules of liability should be applied to the exclusion of State laws. Nearly all the recent decisions, if not all, which considered the applicability of State

Statutes to torts arising in navigable waters, were in respect of proceedings in State tribunals and there was no occasion to consider what application they might have had to suits in admiralty.

So far as we can find, this is the first case in this court where the applicability to tort actions in admiralty of State laws fixing liability has been considered.

In the case of *Trauffler* v. *Detroit & Cleveland Navigation Co.*, 181 Fed. 256, Judge Hazel, in an action in Admiralty in the District Court for the Western District of New York, followed the Employers' Liability Act of the State of New York, but it will be noted that no question was raised as to the applicability of the State law, as is apparent from page 261, where he says:

> "Both sides concede that the rights of recovery herein by the libellants in their representative capacity are not enforcible by the old maritime rules where contributory negligence bars recovery (*sic*), and that the law of the State is controlling."

So far from having considered the force of Section 721, there was no need for him to have considered it, in view of the fact that the parties were willing that the case should be adjudged in accordance with the laws of the State of New York.

In *Cornell Steamboat Co.* v. *Fallon,* 179 Fed. 293, the Circuit Court of Appeals for the Second Circuit held that the personal representatives of a decedent were not limited in their recovery to the amount which the decedent might have recovered had he lived. This decision is construed by the District Court in the *Schuede* case as holding that a seaman injured would have had his rights determined by the maritime law, whereas his administrator was

entitled to have them determined by the State law. If that construction can be given the decision in the *Cornell Steamboat Co.* case, then we say that the court failed to consider Section 721.

In *Quinctte* v. *Bisso,* 136 Fed. 825, an action was brought in admiralty to recover damages for death under the Louisiana law. The question of contributory negligence arose, and the court stated:

> "The statute must be applied in admiralty just as if the suit had been brought in the state courts; and any defences which are open to the defendant under the jurisprudence of the state, if successfully maintained, will bar recovery under the libel."

And the court therefore held that the contributory negligence of the deceased would be a good defence, although it was found that the deceased was not guilty of contributory negligence.

The whole discussion of this proposition is contained in one comparatively short paragraph, and the court bases its conclusion upon certain cases in this court which we think do not warrant the conclusion, and without any independent consideration on the court's part. One of the cases cited in support of the conclusion was *The Harrisburg,* which we have already quoted from under Point I. The points decided in that case were that since the liability and the remedy were created by the same statutes, limitations of the remedy were to be treated as limitations of the right; and that in the absence of statute no action could be brought in admiralty for wrongful death. It is too well settled for argument that contributory negligence affects the remedy and not the right.

The Alaska, 130 U. S. 201, another case cited, simply held in accordance with the rule laid down

in *The Harrisburg* that, in the absence of a state or federal statute, an action could not be maintained for wrongful death and the court did not consider the question as to the applicability of state statutes affecting the remedy in case an action had been commenced based upon a state statute.

The court then quotes from *The Corsair,* 145 U. S. 335, to the effect that

> "this local law did not give a lien or privilege upon the vessel, and that nothing more was contemplated by it than an ordinary action according to the course of law as administered in Louisiana."

This quotation was taken from the opinion, evidently without giving consideration to the point involved and to what was actually decided in the case. In that case the right of action was also based upon the Louisiana law granting a cause of action for death. The question which the court was considering at the time was whether it was proper for the libellant to proceed *in rem,* and the court followed the rule that where it is necessary to look to the local law for the right to take cognizance of a particular cause, it is necessary to inquire whether the local law gives a lien upon the offending thing, because unless a lien in such a case be given by the local law, a proceeding *in rem* may not be started in a court of admiralty. With that proposition laid down, the court proceeded to state what the Louisiana act declared, and said:

> "Evidently nothing more is here contemplated than an ordinary action according to the course of the law as it is administered in Louisiana."

The first part of the quotation in the *Quinette* case is not connected in any respect with what has just been quoted above. Immediately after the quotation above, the court went on to say:

> "There is no intimation of a lien or privilege upon the offending thing, which, as we have already held, is necessary to give a court of admiralty jurisdiction to proceed *in rem*."

Since the only question was whether the proceeding *in rem* was given by the Louisiana law, it is evident that when the court spoke of "An ordinary action according to the course of the law as it is administered in Louisiana", the court simply meant an action *in personam*. There is no warrant, therefore, in anything laid down in *The Corsair* for the conclusion that this court believed that a court of admiralty would be bound by any state law which might be on the statute books simply because the court of admiralty would enforce a right of action for death given by the state statute.

Neither in that case was consideration given to Section 34 of the Judiciary Act.

The statutes of the State of California under consideration here take away from an employer in an action brought by an employee for injuries, or by an employee's personal representatives where death has resulted, the defenses theretofore had by employers, viz., assumption of risk, negligence of a fellow servant and contributory negligence. These statutes are not mere rules of evidence. They affect the rights and liabilities of the parties. This court so held when it had before it the "Prima Facie Act" of Mississippi, which provided that in an action against a railroad for damages, proof of injury inflicted by an engine propelled by steam should be *prima facie* evidence of negligence. (*New*

Orleans & N. E. R. Co. vs. *Harris,* 247 U. S. 367; *Yazoo & Miss. Valley R. Co.* vs. *Mullins,* 249 U. S. 531.)

If a State Legislature in actions by employees against employers brought in a Court of Admiralty, may take away the employer's defenses, then it can go one step further and make the employer responsible for all injuries regardless of negligence. We would then have a compensation law, and a compensation law applicable not only in State Courts but in Courts of Admiralty as well. This would be going far beyond what was contended for in *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205. At the time of that decision no one had the temerity to suggest that a state could force a compensation act upon a court sitting in admiralty.

The so-called Roseberry Act was enacted in 1911 and evidently was the forerunner of the Workmens' Compensation Insurance & Safety Act of California which was enacted in 1913. As a matter of fact this Roseberry Act accomplished practically the same result as is accomplished by one at least of the so-called elective compensation laws. In New Jersey, for instance, an employer may elect not to bring himself within the second part of the compensation law, but in such event the employee can sue for damages under Part One of the law and the employer is stripped of his common law defenses. The employee need only prove negligence and that is all that is necessary for the employee to prove under the Roseberry Act. If the New Jersey compensation law is not applicable to maritime torts, and there is no question but that it is not applicable (*Coon* v. *Kennedy,* 248 U. S. 457, 91 N. J. L. 598), how can it seriously be contended that the Roseberry Act, which is in effect a compensation law, is enforceable in a court of admiralty.

If it were enforceable we would then see a court of admiralty, especially set up by Congress under the authority granted it by the Constitution so that litigants in maritime cases might have a tribunal to which they might go and be assured of uniform justice, informing a litigant that because the tort out of which his claim arose happened in San Francisco, California, instead of Seattle, Washington, he had been stripped of his defenses. The stevedore in Seattle would be told that he could not recover because the hatch-tender was a fellow servant, although his brother stevedore in San Francisco would be enabled to recover although the hatch-tender who caused his injury was his fellow servant.

This Court has held in numerous cases in which actions were brought under the Federal Employers' Liability Act that state statutes would have no application, although the suits were brought in state courts, because Congress had legislated (*New York C. R. R. Co.* vs. *Winfield*, 244 U. S. 147, and cases therein cited). Prior to the enactment of that act the legislatures of the several states had the right to enact laws affecting interstate carriers. Congress by its enactment of the Federal Employers' Liability Act took away from the states the rights which theretofore they had been permitted to exercise. On the other hand, over maritime matters the states had never exercised any jurisdiction, because jurisdiction had been from the beginning reserved to Congress. The distinction was recognized in *Knickerbocker Ice Co.* vs. *Stewart*, 253 U. S. 149, where it was said:

> "The distinction between the indicated situation created by the Constitution relative to maritime affairs and the one resulting from the mere grant of power to regulate commerce without more, should not be forgotten * * *

> Consequently mere reservation of partially concurrent cognizance to such courts by an act of Congress conferring an otherwise exclusive jurisdiction upon national courts could not create substantive rights or obligations, or indicate assent to their creation by the states."

And even though Congress, in enacting Section 34 of the Judiciary Act, had not shown conclusively that state statutes could not affect proceedings in admiralty, still its failure to legislate could not be construed as permission for the states to make their legislation binding in admiralty. This Court has held in *Knickerbocker Ice Co.* vs. *Stewart, supra,* that Congress alone has the right to legislate in maritime matters, and that it could not permit state legislatures by legislation to repeal, amend or change the characteristic features of maritime law. This Court had under consideration in that case the amendment of Clause 3 of Section 24 of the Judicial Code, which added the saving clause: "and to claimants the rights and remedies under the Workmen's Compensation Law of any State." If Congress could not delegate its power to the several states and permit them to enact laws applicable to maritime injuries for which a remedy was sought in state tribunals, certainly it cannot be said that the states without permission from Congress can enact laws applicable, not only in their own courts, but in the admiralty courts as well.

All the late cases, with the exception of *Union Fish Co.* vs. *Erickson,* 248 U. S. 308, considered the applicability of state laws to proceedings in state tribunals or to actions at common law.

Southern Pacific Co. vs. *Jensen,* 244 U. S. 205.

Knickerbocker Ice. Co. vs. *Stewart,* 253 U. S. 149.

Chelentis vs. *Luckenbach*, 247 U. S. 372.
Schuede vs. *Zenith S. S. Co.*, 244 U. S. 646.

In the *Southern Pacific* case the court had under consideration the applicability of the New York Workmen's Compensation Act to maritime injuries. Mr. Justice McReynolds said:

> "Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country * * * And further, that in the absence of some controlling statute the general maritime law as accepted by the Federal Courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction."

Concerning the extent to which the general maritime law may be changed, modified, or affected by state legislation, this was said:

> "No such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. These purposes are forcefully indicated in the foregoing quotations from *The Lottawanna*."

Among such quotations is the following:

> "One thing, however, is unquestionable; the Constitution must have referred to a system of

> laws coextensive with and operating uniformly in the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

After that decision Congress amended the Judicial Code by adding to the saving clause in Section 34 the words "and to claimants the rights and remedies under the Workmens Compensation Law of any state". After that amendment the New York Compensation Law again came before the Court in the *Knickerbocker Ice* case. In writing for the Court, Mr. Justice McReynolds said:

> "As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law, and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose; and to such definite

end Congress was empowered to legislate within that sphere.

"Since the beginning, federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several States—not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago * * *

"The Constitution itself adopted the rules concerning rights and liabilities applicable therein; and certainly these are not less paramount than they would have been if enacted by Congress. Unless this be true, it is quite impossible to account for a multitude of adjudications by the admiralty courts * * *

"Obviously, if every State may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent."

In the *Chelentis* case petitioner while employed on board respondent's steamship was injured and commenced an action at common law in the New York courts to recover for his injuries which action was removed into the District Court for the proper district. Petitioner sought to have applied the common law rule of indemnity. This Court said:

"The work about which petitioner was engaged is maritime in its nature; his employment was a maritime contract; the injuries received were likewise maritime; and the parties' rights and liabilities were matters clearly within the admiralty jurisdiction. *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 59, 60. And unless in some way there was imposed

upon the owners a liability different from that prescribed by maritime law, petitioner could properly demand only wages, maintenance, and cure. Under the doctrine approved in *Southern P. Co.* v. *Jensen*, no state has power to abolish the well-recognized maritime rule concerning measure of recovery, and substitute therefor the full indemnity rule of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the 'uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states. * * *

"Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing there in which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law. Under the circumstances here presented, without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea."

In *Schuede* vs. *Zenith Steamship Co.*, 244 U. S. 646; 216 Fed. 566, plaintiff commenced an action at law in the State Court of Ohio, which was removed to the District Court because of diversity of citizenship. The plaintiff sought to take advantage of the provisions of the Ohio Employers' Liability Act, and it was held by the District Court that that act was not applicable to a maritime contract of employment. On writ of *certiorari* to the Circuit Court of Appeals, this Court affirmed the judgment of the District Court by an equally divided court, Mr. Justice Day not taking part. Mr. Justice Pit-

ney, in his dissenting opinion in the *Southern Pacific Co.* case, refers to this *Schuede* case and states that the reasoning of the District Court is unsatisfactory. This was prior to the determination of the *Schuede* case in the Supreme Court. As we have stated, the action in the *Schuede* case was at law and not in admiralty, and the District Court Judge decided that since the action was commenced in a state court and removed only because of diversity of citizenship, the law applicable in the District Court would be the same as that applicable in a state court. The conclusion arrived at, therefore, in that case was that even in an action brought in a state court on account of a maritime tort, the rights of the parties were to be determined by the recognized rules of maritime law, and that state statutes could neither add to nor take away from those rights. It having been adjudicated that a state statute can have no application in an action brought in a state court for a maritime injury, there can be no doubt that a state statute could have no application in an action brought in a court of admiralty.

If this action had been instituted in the state courts of California instead of in an admiralty court of the United States, the case would be more analagous, and would be on all fours with the *Schuede* case. The question presented then would be whether the State Legislature could enact any legislation affecting maritime rights regardless of the jurisdiction in which remedy was sought. The holding of a majority of this Court in the cited cases would warrant the conclusion that even in such a case, the Roseberry Act would not be applicable. However, it is not necessary for us to go as far as that in our contention.

Here is a suit instituted in a court of admiralty

in which it is sought to make the liabilities of the parties dependent upon local laws, and as the late Chief Justice said in *Workman* vs. *New York City,* 179 U. S. 552:

> "The issue is not as was the case in *Detroit* vs. *Osborne* (1890), 135 U. S. 492—whether the local law governs as to a controversy arising in the courts of common law or of equity of the United States, but does the local law, if in conflict with the maritime law, control a court of admiralty of the United States in the administration of maritime rights and duties, although judicial power with respect to such subjects has been expressly conferred by the Constitution (Article III, Section 2) upon the courts of the United States."

It is true that the local law there spoken of was not a state statute, but the decisions of the New York Court of Appeals holding that a city could not be sued for negligence causing injuries when engaged in a governmental function. Whether the local law be statutory or the decision of a state court is immaterial. The fundamental objection to its application is that the principles of the general maritime law might be overthrown. Just as the decisions of the several state courts might be conflicting, so might the enactments of the several state legislatures be conflicting. The court showed that there could be no difference in the result, whether it be a state law or a state decision when it said:

> "As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing to-day and another thing tomorrow."

It has always been recognized that there is a very material difference in the liabilities of the parties to a suit according as it was one at common law or in admiralty, and that whereas such liabilities at common law might change with the several states, they would remain the same in admiralty. Even the dissenting members of this court in the recent cases recognized the rule. Although the exhaustive opinions of Mr. Justice Holmes and Mr. Justice Pitney in *Southern Pacific Co.* v. *Jensen*, were directed toward the argument that the states had the power to enact laws which would be of effect in actions and proceedings in state tribunals arising out of maritime injuries, there may be sufficient taken from them to show that it is the unanimous opinion of this court that an admiralty court cannot and will not be bound by common law or statutory rules of liability.

Mr. Justice Holmes said:

> "This court has recognized that in some cases different principles of liability would be applied as the suit should happen to be brought in a common law or admiralty court. Compare *The Max Morris*, 137 U. S. 1, with *Belden* vs. *Chase*, 150 U. S. 674, 691. But hitherto it has not been doubted authoritatively, so far as I know, that even when the admiralty had a rule of its own to which it adhered, as in *Workman* v. *New York*, 179 U. S. 552, the state law, common or statute, would prevail in the courts of the state. Happily such conflicts are few."

Mr. Justice Pitney stated this to be one of his conclusions from a study of the Constitution, Judiciary Act and decisions:

> "* * * (3) that by the law of England, and by the practice of the colonial governments, the courts of common law, of equity,

> and of admiralty were controlled in their decisions by separate, and, in a sense, independent systems of substantive law, and the constitutional grant of judicial power in 'all cases in law and equity', and in 'all cases of admiralty and maritime jurisdiction', was no more intended (in the absence of legislation by Congress) to make the rules of maritime law binding upon the Federal courts of common law when exercising their concurrent jurisdiction, than to make the rules of the common law binding upon the courts of admiralty."

The question before the court in this case is answered in this succinct statement by Mr. Justice Pitney in the same case:

> "In this language there is the clearest recognition that the Constitution, in establishing and distributing the judicial power, did not intend to define substantive law, or to make the rules of decision in one jurisdiction binding *proprio vigore* in tribunals exercising another jurisdiction. The courts of common law were to administer justice according to the common law, the courts of equity according to the principles of equity, and the courts of admiralty and maritime jurisdiction according to the maritime law. The expression on page 575 (of the *Lottawanna* case) respecting the uniform operation of the maritime law was predicated only of the operation of that law as administered in the courts of admiralty, for it is not to be believed that there was any purpose to overrule *Atlee* v. *Northwestern Union Packet Co.*, 21 Wall. 389, 395, decided at the same term and only about two months before *The Lottawanna* by a unanimous court, including Mr. Justice Bradley himself, in which it was held that where there was concurrent jurisdiction in the courts of common law and the courts of admiralty, each court was at liberty to adopt its own rules of decision."

In the *Workman* case it was said, at page 558:

> "The practical destruction of a uniform maritime law, which must arise from this premise, is made manifest when it is considered that if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would necessarily be one thing in one state and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted, or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing to-day and another thing tomorrow. That the confusion to result would amount to the abrogation of a uniform maritime law is at once patent. * * *"

And at page 563:

> "* * * The local decisions of one or more states cannot, as a matter of authority, abrogate the maritime law. * * *"

In *Steamboat New York* vs. *Rae*, 59 U. S. 223, there was a collision between two vessels. The point was made by the steamboat that the brig in collision with it was at fault in not showing a light. The evidence showed that a light was shown but the steamboat claimed that although the brig had a light sufficient within the requirements of the admiralty rule still she was at fault in not show-

ing a light in conformity with the statutes of New York. In disposing of this question this court said:

> "This is a rule of navigation prescribed by the laws of New York, and is doubtless binding upon her own courts, but cannot regulate the decisions of the Federal Courts, administering the general admiralty law. They can be governed only by the principles peculiar to that system, as generally recognized in maritime countries, modified by Acts of Congress independently of local legislation."

In *Atlee* vs. *N. W. Union Packet Co.*, 21 Wall. 389, it was said:

> "But the plaintiff has elected to bring his suit in an admiralty court, which has jurisdiction of the case, notwithstanding the concurrent right to sue at law. In this court the course of proceeding is in many respects different and the rules of decision are different. The mode of pleading is different, the proceeding more summary and informal, and neither party has a right to trial by jury. An important difference as regards this case is the rule for estimating the damages.
>
> "In the common law court the defendant must pay all the damages or none. If there has been on the part of plaintiffs such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the admiralty court, where there has been such contributory negligence, or, in other words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties. This rule of the admiralty commends itself quite as favorably in its influence in securing practical justice, as the other; and the plaintiff who has the selection of the forum in which he will litigate, cannot complain of the rule of that forum.

> "It is not intended to say that the principles which determine the existence of mutual fault on which the damages are divided in admiralty, are precisely the same as those which establish contributory negligence at law that would defeat the action. Each court has its own set of rules for determining these questions, which may be in some respects the same, but in others vary materially."

In *The Eagle* vs. *Fraser,* 8 Wall. 15, there was a collision on the Canadian side of the line through the Detroit River between Canada and the United States and the point was made that the law of the place where the tort was committed should apply, and that there was no law in force in Canada giving a lien for damages. In support of the contention reliance was had on the case of *Smith* vs. *Conary,* 1 Howard, 28, where it was held in the case of a collision in the port of Liverpool that, in view of the fact that the laws of England oblige the ship to take on a pilot, this excused the owner of the vessel for the negligence of the pilot. In passing upon this contention the court said:

> "These are exceptional cases and furnish no rule to the court below for the trial of the collisions in question. It was tried, therefore, as it should have been tried, according to the practice and principles of the courts of admiralty in this country, wholly irrespective of any local law."

In *Watts* vs. *Camors,* 115 U. S. 353, it was said:

> "But the law of Louisiana does not govern this question, whether it is treated as a question of construction of the contract of the parties, or as a question of judicial remedy.
>
> "If it is considered as depending upon the intent of the parties as manifested by their written contract, the performance of that con-

tract is to be regulated by the law which they must be presumed to have had in view when they executed it. *Wayman* v. *Southard*, 10 Wheat. 1, 48; *Pritchard* v. *Norton*, 106 U. S. 124. Americans and Englishmen entering into a charter-party of an English ship for an ocean voyage, must be presumed to look to the general maritime law of the two countries, and not to the local law of the State in which the contract is signed.

"If it is considered as a question of the remedy and relief to be judicially administered, the equity and admiralty jurisdiction of the courts of the United States, under the national Constitution and laws, is uniform throughout the Union, and cannot be limited in its extent, or controlled in its exercise, by the laws of the several States."

In *Butler* vs. *Boston, etc., S. S. Co.*, 130 U. S. 527, it was said:

"It is unnecessary to consider the force and effect of the statute of Massachusetts over the place in question. Whatever force it may have in creating liabilities for acts done there, it cannot neutralize or affect the admiralty or maritime jurisdiction or the operation of the maritime law in maritime cases. Those are matters of national interest. If the territory of the State technically extends a marine league beyond the seashore, that circumstance cannot circumscribe or abridge the law of the sea."

The Lottawanna, 21 Wall. 558;
The Max Morris, 137 U. S. 1;
Belden v. *Chase*, 150 U. S. 674;
The Genesee Chief, 12 How. 443;
Leon v. *Galceran*, 11 Wall. 185;
Liverpool & Great Western Steam Co. v. *Phenix Ins. Co.*, 129 U. S. 397;
La Bourgogne, 210 U. S. 95.

It is argued that this case is unlike the *Schuede* case because this is an action for death whereas the *Schuede* case was one for personal injuries and that the opinion in the *Schuede* case impliedly conceded that the ruling might have been different if the action had been for death. Whether the action be one to recover for personal injuries or to recover for death cannot affect the determination. Although it is true that in admiralty the personal representatives of the deceased must rely upon the state statute for their right to commence an action, still the state statutes do not add anything to the jurisdiction of the admiralty courts. An admiralty court has full and complete jurisdiction over maritime wrongs and injuries of every kind and description. The only question is as to whether an admiralty court will grant any relief.

In *Ex Parte Gordon*, 104 U. S. 515, an action was brought in the District Court of Maryland for damages for the drowning of certain persons in consequence of a collision. The owners of one of the steamers in collision sought a writ of prohibition to restrain the District Court from proceeding with the cause, the claim being that since there was no action for death known to admiralty, the District Court was without jurisdiction to proceed. This court said:

> "The Court of Admiralty has jurisdiction of the vessel, and the subject-matter of the action, to-wit, the collision. It is competent to try the facts, and, as we think, to determine whether, since the common law courts in England and to a large extent in the United States, are permitted to estimate damages which a particular person has sustained by the wrongful killing of another, the courts of admiralty may not do the same thing. * * * Under these circumstances, it seems to us clear that the admiralty courts are competent to determine all the questions involved."

A court of admiralty will recognize state statutes permitting a recovery for death, but will enforce them in accordance with the well recognized principles of maritime law. If it were otherwise an unfortunate state of affairs would follow. This might be a result: A person suing for personal injuries in an admiralty court would be defeated because of assumption of risk or that his injury was caused by a fellow servant. At the same time that he received his personal injury a man working immediately next to him was killed by the same accident. The personal representatives of the deceased might commence an action at the same time in the same court of admiralty, and they would be permitted to recover because it would not be open to the employer to say that the deceased assumed the risk or that his death was caused by the negligence of a fellow servant. That would certainly be lack of uniformity.

And this contention is made with full knowledge of the fact that a state statute permits a recovery in a death action only in cases where the deceased, if he had lived, himself might have recovered for his injuries. The proof required to recover under state statutes is the same whether the action be for personal injuries or for death. The defenses which can be interposed are the same whether the action be for personal injuries or for death. The only difference in the two actions is one of procedure, and that only in some states. It is a rule of the common law of the states that an employee in order to recover must show himself to be free from contributory negligence. In an action for death some states provide that because the deceased is not present and therefore has no opportunity of showing his freedom from contributory negligence, the burden is upon the employer of proving

contributory negligence. Such statutes have been held, however, merely to be rules of procedure and not affecting the substantial rights of the parties. (*Sackheim* v. *Pigueron*, 215 N. Y. 62.) We doubt that any state could enact legislation which could permit a recovery in death cases where there was assumption of risk, negligence of a fellow servant or contributory negligence, and at the same time refuse a right to recover in personal injury actions because of assumption of risk, negligence of a fellow servant or contributory negligence. Such legislation would be highly discriminatory and contrary to the Constitution. The contention that in a Court of Admiralty different rules of liability should be applied in actions for personal injury and in actions for death is unreasonable.

From the beginning it has always been recognized that there was a difference in the rules of liability applicable in courts of common law and courts of admiralty. Under the Judiciary Act a person injured by reason of a maritime tort has the election of proceeding in admiralty or proceeding at common law. As Mr. Justice Pitney says in the *Jensen* case, that saving clause was solely for the benefit of claimants. It is open to a claimant before starting an action to determine in which jurisdiction he would prefer to sue. If he proceeds in a court of common law he acquires the benefits and assumes the obligations of the common law. If he proceeds in admiralty, he acquires the benefits and assumes the obligations of admiralty. It was open to the plaintiff in this case to proceed in the State Courts of California and there avail himself of the California Statutes. However, he preferred to commence this action in a court of admiralty, and it would be absurd to say that, having had the choice of jurisdiction, he could elect to bring his

action in one jurisdiction and refuse to be bound by the obligations imposed in that jurisdiction, although wishing to avail himself of the benefits. And that, too, where the law he wishes to avail himself of is in conflict with the law of the forum.

It is no answer to say that the plaintiff did have the right to come into a Court of Admiralty. That right is conceded. But a man with an election of jurisdictions cannot proceed in one and insist upon having the rules of another jurisdiction applied.

The State of California has certain jurisdiction over the waters within its boundaries. The United States has paramount jurisdiction over the waters throughout the country, whether within or without the boundaries of any State. Whatever jurisdiction the State courts of California have over torts committed on navigable waters within the State of California, they have solely because of the saving clause in the Judiciary Act. Even though we assume what has been denied that the State of California may enact any legislation it sees fit which is applicable in the Courts of the State of California to actions for maritime tort, it certainly cannot be said that it has the right to legislate and make that legislation binding upon the paramount authority, the Federal Government and the District Courts to whom jurisdiction was given by the Federal Government.

The argument that because in this case admiralty is enforcing a right given by a state statute the liabilities of the parties are fixed by the state statutes, is satisfactorily answered by the decision in *The J. E. Rumbell,* 148 U. S. 1, holding that because admiralty would enforce a lien given by a state statute was no reason for saying that the state laws should determine how it should be enforced. The question presented was whether a claim arising upon

a vessel mortgage is to be preferred to the claim for supplies and necessaries furnished to a vessel in its home port in the State of Illinois subsequently to the date of the recording of the mortgage. The State law had created a lien for repairs or supplies furnished to a vessel in her home port and the courts of the United States held in Illinois, as well as the Supreme Court of that State had held that a mortgage took precedence of such a lien for supplies afterwards furnished to a vessel in her home port. In refusing to follow such decisions, this court said:

> "But the question in controversy depends upon principles of general jurisprudence and upon the true construction of an Act of Congress, and arises in the courts of the United States exercising the admiralty and maritime jurisdiction exclusively vested in them by the Constitution. Upon such a question, neither the decisions of the highest court of a State, nor those of the circuit and district courts of the United States, can relieve this court from the duty of exercising its own judgment. *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* 129 U. S. 397, 443; *Andrews* v. *Hovey,* 124 U. S. 694, 717. * * *
>
> "It would seem to follow that any priority given by the statute of a state, or by decisions at common law or in equity, is immaterial; and that the admiralty courts of the United States, enforcing the lien because it is maritime in its nature, arising upon a maritime contract, must give it the rank to which it is entitled by the principles of the maritime and admiralty law. As was forcibly said by Mr. Justice Matthews, in *The Guiding Star,* above cited, 'In enforcing the statutory lien in maritime causes, admiralty courts do not adopt the statute itself, or the construction placed upon it by courts of common law or of equity, when they apply it. Everything required by the statute, as a condition on which the lien arises

and vests, must, of course, be regarded by courts of admiralty; for they can only act in enforcing a lien when the statute has, according to its terms, conferred it; but beyond that the statute, as such, does not furnish the rule for governing the decision of the cause in admiralty, as between conflicting claims and liens. The maritime law treats the lien, because conferred upon a maritime contract by the statute, as if it had been conferred by itself, and consequently upon the same footing as all maritime liens; the order of payment between them being determinable upon its own principles' 18 Fed. Rep. 268."

POINT III.

Since Souza met his death by reason of the negligence of a fellow servant, no recovery can be had.

The trial court found:

> "6. The death of Souza was due to the negligence of Hayes in withdrawing the bucket from the hopper before it was fully dumped, and to the negligence of the hatch-tender in not giving warning to those in the hold" (p. 161).

The Circuit Court of Appeals approved this finding (p. 198).

The trial court, holding that the California Statutes taking away the defense of negligence of a fellow servant were applicable, granted a recovery (p. 160). The Circuit Court of Appeals, however, held that the state statutes were not applicable, and that as the negligence was that of fellow servants there could be no recovery (p. 206).

If our contention embodied in Point II is correct, that is that these state statutes have no application,

then there can be no recovery in this case, because Hayes and Costa were fellow servants of Souza. They were engaged in the same common employment; they were actually engaged in the same operation, unloading this steamboat. Hayes, Costa and Souza were working in the same gang; each had a different duty to perform, but the common end in view was the unloading of the boat. Even though it could be found that they were engaged in different departments, there could be no recovery because this case would not be within the rule laid down in *Northern Pacific Railroad Company* vs. *Hambly*, 154 U. S. 349, where it was said:

> "This is probably the most satisfactory test of liability. If the departments of the two servants are so separated from each other that the possibility of coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow-servant should not apply."

Here it is conceded that the men in the hold were cognizant of the fact that coal dropped from the bucket and the hopper, and it must be conceded that they knew if the engineer or the hatch-tender was negligent they might be injured. The hatch-tender stood in an intermediate position between Souza and Hayes and the dump-man. The fact that he may have received higher wages does not make him any the less a fellow servant. Under the decisions of this court there can be no doubt that they were all fellow-servants.

Quebec S. S. Co. vs. *Merchant*, 133 U. S. 375;

Alaska, etc., Gold Mining Co. vs. *Whelan*, 168 U. S. 86;

Northern Pacific R. R. Co. vs. *Charless*, 162 U. S. 359;
Baltimore & Ohio R. R. Co. vs. *Baugh*, 149 U. S. 368;
Railroad Company vs. *Conroy*, 175 U. S. 323.

The decisions of the lower courts are in agreement.

The Hoquiam, 253 Fed. 627;
Olson vs. *Oregon Coal & Navigation Co.*, 104 Fed. 574;
Grumsley vs. *Hawkins*, 46 Fed. 402;
The Bolivia, 59 Fed. 628;
Hermann vs. *Port Blakley Mill Co.*, 71 Fed. 859;
The Anaces, 87 Fed. 569;
City of Norwalk, 55 Fed. 102;
The Troop, 128 Fed. 858;
The West-Port, 136 Fed. 391;
The C. S. Holmes, 220 Fed. 273;
The Rosalie Mahony, 218 Fed. 695.

Conclusion.

The decree of the District Court should be reversed and the libel should be dismissed.

Respectfully submitted,

JOSEPH F. MURRAY,
Counsel for Petitioner.

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Supreme Court of the United States,

OCTOBER TERM— [redacted] 1920

WESTERN FUEL COMPANY, a Corporation,
Appellant,
AGAINST
ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, deceased,
Appellee.

No. 229 [redacted]

BRIEF FOR WESTERN FUEL COMPANY.

Statement.

This case is here upon certificate from the United States Circuit Court of Appeals for the Ninth Circuit. The latter court certifies to this court the following questions concerning which it desires instructions:

> "1. Are the statutes of the State of California, conferring the right of action for wrongful death, to be applied in libels in admiralty for wrongful death?
>
> 2. If the state statutes do apply, are they to be applied with all their incidents abolishing

or modifying the common-law defenses of assumption of risk, contributory negligence and the negligence of a fellow servant, or

3. Does the state statute merely give the right of action and leave for application the rules of maritime law covering personal injuries, thus doing away with any distinction heretofore recognized between actions for personal injuries not resulting in death and actions for wrongful death sanctioned by state statutes?"

Appellee's intestate, Manuel Souza, was killed on August 5, 1916, while in the employment of the appellant and working in the hold of the Steamship *Tancred,* which was unloading at Oakland, California. On August 24, 1916, the widow of Manuel Souza made application for the payment of compensation to her by the appellant under the terms of the Workmen's Compensation Insurance & Safety Act of California (Chapter 176, Laws of 1913). An award was made in her favor by the State Industrial Accident Commission and on August 6, 1917, the Supreme Court of California annulled the award on the ground that the State Industrial Accident Commission had no jurisdiction in view of the decision of this court in the case of *Southern Pacific Company* vs. *Marie Jensen,* 244 U. S. 207. Thereafter and on August 21, 1917, this action was initiated by the filing of a libel for damages for wrongful death in the District Court of the United States for the Northern District of California, Southern Division. The appellee was awarded judgment for the sum of Ten Thousand ($10,000) Dollars, from which appellant appealed to the Circuit Court of Appeals. The appellee's cause of action was based upon the Statutes of the State of California, giving a right of action for wrongful death (Section 377,

Code of Civil Procedure; Section 1970 of Civil Code of California).

Code of Civil Procedure, Section 377, is as follows:

> "Section 377. When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

This section so far as actions by employees was concerned was amended by Civil Code Section 1970, reading as follows:

> "Section 1970. An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee, or unless the employer has neglected to use ordinary care in the selection of the culpable employee; provided nevertheless, that the employer shall be liable for such injury when the same results from the wrongful act, neglect, or default of any agent or officer of such employer, superior to the employee injured, or of a person employed by such employer having the right to control or direct the services of such employee injured, and also when such injury results from the wrongful act, neglect or de-

fault of a co-employee engaged in another department of labor from that of the employee injured, or employed upon a machine, railroad train, switch-signal point, locomotive-engine, or other appliance than that upon which the employee is injured is employed, or who is charged with dispatching trains, or transmitting telegraphic or telephonic orders upon any railroad, or in the operation of any mine, factory, machine-shop, or other industrial establishment.

"Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such employer shall not be a bar to recovery for any injury or death caused thereby, unless it shall also appear that such employee fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures, and thereafter consented to use the same, or continued in the use thereof.

"When death, whether instantaneous or otherwise, results from an injury to an employee received as aforesaid, the personal representative of such employee shall have a right of action therefor against such employer, and may recover damages in respect thereof, for and on behalf, and for the benefit of the widow, children, dependent parents, and dependent brothers and sisters, in order or precedence as herein stated, but no more than one action shall be brought for such recovery.

"Any contract or agreement, express or implied, made by any such employee to waive the benefits of this section, or any part thereof, shall be null and void, and this section shall not be construed to deprive any such employee or his personal representative, of any right or remedy to which he is now entitled under the laws of this state.

"The rules and principles of law as to con-

tributory negligence which apply to other cases shall apply to cases arising under this section, except in so far as the same are herein modified or changed."

In 1911 the California legislature passed the so-called Roseberry Act (Stats. 1911, p. 796), which provides in part:

"Section 1. In any action to recover damages for a personal injury sustained within this state by an employee while engaged in the line of his duty or the course of his employment as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent, or servant of the employer, the fact that such employee may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee, and it shall be conclusively presumed that such employee was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employees contributed to such employee's injury; and it shall not be a defense:

"(1) That the employee either expressly or impliedly assumed the risk of the hazard complained of.

"(2) That the injury or death was caused in whole or in part by the want of ordinary or reasonable care of a fellow-servant.

"Section 2. No contract, rule or regulation, shall exempt the employer from any of the provisions of the preceding section of this act."

The pertinent sections of the Statute of Limitations of the State of California are in the Code of Civil Procedure.

C. C. P., Section 340, Subdivision 3, is as follows:

> "Within One Year:
>
> "3. An action for libel, slander, assault, battery, false imprisonment, seduction or for injury to or for the death of one caused by the wrongful act or neglect of another or by a depositor against a bank for the payment of a forged or raised check."

C. C. P., Section 355, is as follows:

> "If an action is commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, the plaintiff, or if he die and the cause of action survive, his representatives, may commence a new action within one year after the reversal."

The District Court in rendering its decree applied the provisions of the statutes above quoted, except the statute of limitations, particularly the Roseberry Act which abolishes the doctrine of assumption of risk and the defence of an accident which was caused by the negligence of a fellow servant.

On appeal the Circuit Court of Appeals affirmed the judgment, but held that although a court of admiralty will enforce a right of action for the death of a deceased given by a state statute, it will enforce it in accordance with the recognized principles of maritime law unaffected by the provisions of any state or local law. (*Western Fuel Company* vs. *Garcia*, 255 Fed. 817.)

A rehearing in the Circuit Court of Appeals was thereafter had upon motion of the appellant and after rehearing the Court of Appeals reversed the

judgment on the ground that the death was caused by the negligence of a fellow servant, but stated that in all other respects the court was satisfied with the correctness of its former decision (*Western Fuel Company* vs. *Garcia*, 260 Fed. 839). Thereafter the appellee petitioned for a rehearing and thereupon the Circuit Court of Appeals, Circuit Judge Ross dissenting, certified the questions presented herein.

POINT I.

The statutes of the State of California conferring a right of action for wrongful death are to be applied in libels in admiralty for wrongful death.

In admiralty no cause of action exists to recover damages for death through negligence. This was settled by this court in *The Harrisburg*, 119 U. S. 199, where it was said:

> "Since, however, it is now established that in the courts of the United States no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty from those which govern the courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law. The rights of persons in this particular under the maritime law of this country are not different from those under the common law, and as it is the duty of courts to declare the law, not to make it, we cannot change this rule."

The admiralty courts, however, will enforce a right of action for wrongful death which may be given by a state statute where the tort occurs on navigable waters.

The Harrisburg (supra).
La Bourgogne, 210 U. S. 95, 138.
The Hamilton, 207 U. S. 398.

This is no departure from the general rule that state laws can neither extend nor restrict the jurisdiction of the admiralty courts, for such a statute merely creates a right which is separate from the remedy to be enforced in the proper tribunal.

It is likewise well settled, however, that where a state statute gives a right of action for wrongful death and the time within which such an action may be brought is limited, admiralty although enforcing the right will also observe the limitation.

In *The Harrisburg* (*supra*) the steamer belonged to the Port of Philadelphia and the death occurred in waters within the State of Massachusetts. The Statutes of Pennsylvania gave a right of action for wrongful death but limited the time within which the action might be brought to one year after the death. The Statutes of Massachusetts penalized a corporation which caused wrongful death by a fine to be recovered by indictment. The Statutes provided that such indictments should be prosecuted within one year after the injury causing the death. The action in the case was not brought within one year, and this court said:

> "The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and

not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year, and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right."

This court said in *Davis* vs. *Mills*, 194 U. S., 451, 454:

"The general theory on which an action is maintained upon a cause which accrued in another jurisdiction is that the liability is an *obligatio*, which, having been attached to the person by the law then having that person within its power, will be treated by other countries as accompanying the person when brought before their courts. But, as the source of the obligation is the foreign law, the defendant, generally speaking, is entitled to the benefit of whatever conditions and limitations the foreign law creates. *Slater* v. *Mexican National Railroad*, 194 U. S. 120. It is true that this general proposition is qualified by the fact that the ordinary limitations of actions are treated as laws of procedure and as belonging to the *lex fori*, as affecting the remedy only and not the right. But in cases where it has been possible to escape from that qualification by a reasonable distinction courts have been willing to treat limitations of time as standing like

other limitations and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. *The Harrisburg,* 119 U. S. 199. But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right."

In *Atlantic Coast Line Railroad* vs. *Burnett,* 239 U. S. 199, 201, it is said:

"When a law that is relied on as a source of an obligation in tort, sets a limit to the existence of what it creates, other jurisdictions naturally have been disinclined to press the obligation farther. *Davis* vs. *Mills,* 194 U. S. 451-454; *The Harrisburg,* 119 U. S. 199."

"A suit in admiralty to recover damages for death, brought by virtue of a state statute, is governed by the provisions of the statute on which the right of action rests; *e. g.,* the provisions of the statute regulating the time within which such suit must be brought."

Benedict's Admiralty, 4th Ed., Sec. 240, citing:

Stern v. *La Comp. Gen. Trans.,* 110 Fed. 996;

The A. W. Thompson, 39 Fed. 115, and other cases.

"While courts of admiralty are not bound by local statutes, in determining the question of

laches they govern themselves by the analogies of the common law or statutory limitations, in the absence of special or exceptional circumstances."

I Corpus Juris, 1329, Note 30.

"The policy of statutes of limitation as statutes of repose must be respected in courts of admiralty as much as in courts of common law. In the careful brief furnished by the libelant no case is cited where any suit has been sustained after the lapse of the statutory period."

Nesbit v. *The Amboy*, 36 Fed. 925;
The Southwark, 128 Fed. 149.

"Where a state statute creating a lien or right of action limits the time within which a proceeding thereon may be begun admiralty will observe the limitation."

The Edith, 94 Fed. 518;
The James G. Swan, 106 Fed. 94;
The Catherine Whiting, 99 Fed. 445;
The H. N. Emilie, 70 Fed. 511.

"Where a cause of action rests wholly on a state statute which requires suits founded thereon to be commenced within a limited time, the proviso as to time attaches to the right of action itself and runs with the statute into the admiralty courts."

Stern v. *La Comp. Gen. Trans.*, 110 Fed. 996.

Circuit Judge Ross, writing for the lower court, states that a court of admiralty would enforce a right of action for death given by a state statute unaffected by the provisions of any state or local laws, and went on to say:

"For this reason the California Statute of Limitations of one year, relied upon by the appellant in-

volved in the action, has no more application to the case than had the California Statute of Frauds involved in the case of *Union Fish Company* vs. *Erickson, supra,* just decided by the Supreme Court."

Western Fuel Company v. *Garcia,* 255 Fed. 817.

The *Erickson* case, however, is quite dissimilar. In that case the plaintiff's cause of action did not depend upon any state law. He was given the right of action by admiralty itself because he was suing upon a maritime contract. This court, therefore, properly held that he could not be limited by any state law as to the time within which he might bring an action on the contract.

The first question should be answered in the affirmative.

POINT II.

The state statute merely gives the right of action and leaves for application the rules of maritime law covering personal injuries.

A court of admiralty enforces a right of action in accordance with the recognized principles of maritime law unaffected by the provisions of any state or local law. The state statutes are to be resorted to only to ascertain whether a right of action is conferred.

In the *Steamboat New York* vs. *Rea,* 59 U. S. 223, there was a collision between two vessels. The point was made by the steamboat that the brig in collision with it was at fault in not showing a light. The evidence showed that a light was shown but the steamboat claimed that although the brig had a

light sufficient within the requirements of the admiralty rule still she was at fault in not showing a light in conformity with the statutes of New York. In disposing of this question this court said:

> "This is a rule of navigation prescribed by the laws of New York, and is doubtless binding upon her own courts, but cannot regulate the decisions of the Federal Courts, administering the general admiralty law. They can be governed only by the principles peculiar to that system, as generally recognized in maritime countries, modified by Acts of Congress independently of local legislation".

This court in the case of *Atlee* vs. *Packet Company*, 88 U. S. 389, 395, very aptly said:

> "But the plaintiff has elected to bring his suit in an admiralty court, which has jurisdiction of the case, notwithstanding the concurrent right to sue at law. In this court the course of proceeding is in many respects different and the rules of decision are different. The mode of pleading is different, the proceeding more summary and informal, and neither party has a right to trial by jury. An important difference as regards this case is the rule for estimating the damages.
>
> "In the common-law court the defendant must pay all the damages or none. If there has been on the part of plaintiffs such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the admiralty court, where there has been such contributory negligence, or in other words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties. This rule of the admiralty commends itself quite as favorably in its influence in securing practical justice as the other, and the plaintiff who has the selection of the forum in which he will

litigate, cannot complain of the rule of that forum.

"It is not intended to say that the principles which determine the existence of mutual fault on which the damages are divided in admiralty, are precisely the same as those which establish contributory negligence at law that would defeat the action. Each court has its own set of rules for determining these questions, which may be in some respects the same, but in others vary materially."

To the same effect is

Steamboat Company vs. *Chase*, 83 U. S. 532.

Ex Parte Gordon, 104 U. S. 515.

In *La Bourgogne*, 210 U. S. 95, 140, in considering the question of the right to recover for a loss by death, this court said:

"The proposition then is this, that the right of action (for death) allowed by the French law may not, for the purposes of the limitation of liability, be allowed by the courts of the United States, unless such courts abdicate their functions by declining to draw their own inferences from the proof as to negligence, and, to the contrary, make such inferences as they assume would be drawn by a French court if the proof was before such court. The duty to enforce a cause of action given by the French law does not carry with it the obligation to disregard the proof by declining to give it that effect to which it is entitled under the laws as administered in the courts of the United States."

And as Mr. Justice, now Chief Justice White, said in the case of *Workman* vs. *New York City*, 179 U. S. 552:

"We come then to consider first, whether, in the decision of a controversy, the local law of

the City of New York or the maritime law should control. * * *

"In examining the first question, that is, whether the local law of New York must prevail, though in conflict with the maritime law, it must be borne in mind that the issue is not—as was the case in *Detroit* vs. *Osborne* (1890), 135 U. S. 492—whether the local law governs as to a controversy arising in the courts of common law or of equity of the United States, but does the local law, if in conflict with the maritime law, control a court of admiralty of the United States in the administration of maritime rights and duties, although judicial power with respect to such subjects has been expressly conferred by the Constitution (Article III, Section 2) upon the courts of the United States.

"* * * The practical destruction of a uniform maritime law which must arise from this premise, is made manifest when it is considered that if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts, can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one State and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing to-day and another thing to-morrow. That the confusion to result would amount to the abrogation of a uniform maritime law is at once patent."

And in speaking of the decision in *The Max Morris,* 137 U. S. 1, 14, the court said:

> "It was held that as by the general principles of the maritime law a measure of relief would be afforded to a person who had suffered a wrong, it was the duty of the admiralty courts to grant relief in accordance with the principles of the maritime law."

Time after time this court has applied the same rules, and in the very recent case of *Knickerbocker Ice Company* vs. *Stewart,* 253 U. S. 149, 160, 166, this court said:

> "As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.
>
> "Since the beginning, federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several States—not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so

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administered, were distinctly pointed out long ago.

"* * * Obviously, if every State may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent."

In *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, this court said:

"Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country * * * And further, that in the absence of some controlling statute the general maritime law as accepted by the Federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction."

Concerning extent to which the general maritime law may be changed, modified, or affected by state legislation, this was said:

"No such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. These purposes are forcefully indicated in the foregoing quotations from *The Lottawanna.*"

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Among such quotations is the following:

> "One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been intended to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

The law is now well settled and a long list of decisions may be cited in support thereof. A few follow:

The Lottawanna, 21 Wall. 558; 22 L. Ed. 654;
Chelentis v. *Luckenbach S. S. Co.*, 247 U. S. 372;
Union Fish Co. v. *Erickson*, 248 U. S. 308;
The City of Alexandria, 17 Fed. 390;
The City of Norwalk, 55 Fed. 98; affirmed 61 Fed. 364;
Schuede v. *Zenith S. S. Co.*, 216 Fed. 566;
Tropical Fruit S. S. Co. v. *Towle*, 222 Fed. 867.

In a number of decisions the lower courts have so expressly stated that the maritime law will be administered without regard to the rules of law enacted by state legislatures that it may be well to call attention to the specific language employed.

In *Welch* v. *North Cambria*, 40 Fed. 655, the court said:

> "* * * The states have no power to interfere with the admiralty system of laws."

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In *The Chusan,* Fed. Cas. 2717, the court said:

> "In the exercise of this admiralty and maritime jurisdiction, the courts of the United States are exclusively governed by the legislation of Congress, and in the absence thereof, by the general principles of the maritime law. The states have no right to prescribe the rules by which the courts of the United States shall act, nor the jurisprudence which they shall administer."

In *Mack S. S. Co.* v. *Thompson,* 176 Fed. 499, the court said (p. 504):

> "We think the maritime law subsists as an entirety as the subject of federal jurisprudence, and is to administered by the federal courts without impairment by state legislation. If changes are to be made in it, it must be done by federal authority."

In *The H. B. Hyde,* 195 Fed. 312, it was said:

> "The maritime law, which the libelant invokes, cannot be altered, modified, or changed by state enactment. The right of action arising out of a maritime tort, relating to the recovery of damages for personal injuries, depends upon the maritime law, which has been adopted by the laws and usages of the country."

The foregoing decision was expressly approved by the court in

Swayne & Hoyt v. *Barsch,* 226 Fed. 581,

the court saying that the rule there announced "is well settled".

There is no distinction in principle, nor we believe to be found in precedent, in the application in admiralty of the doctrine of the defense of negligence of fellow servant, between actions for per-

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sonal injuries not resulting in death and actions for wrongful death.

If such a distinction is now to be drawn, will the proper harmony and uniformity and the characteristic features of the general maritime law be maintained? Will not the different modifications made by the various state statutes in their incidents relating to various defenses inevitably destroy such harmony and uniformity?

The second question should be answered in the negative and the third question in the affirmative.

Conclusion.

The first and third questions should be answered in the affirmative and the second question in the negative.

Respectfully submitted,

JOSEPH F. MURRAY,
ROBERT M. MCCORMICK,
Counsel for Western Fuel Company.

Office Supreme Court, U. S.
MAR 2 1920
JAMES D. MAHER,
CLERK.

No. [redacted]

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1919

THE WESTERN FUEL COMPANY.
(a corporation),
Petitioner,

vs.

ANTONE GARCIA, as administrator of the estate of Manuel Souza, deceased,
Respondent.
(Libelant below)

PETITION TO THE SUPREME COURT OF THE UNITED STATES, UNDER THE ACT OF CONGRESS OF MARCH 3, 1891,

For Writ of Certiorari to the United States Circuit Court of Appeals, for the Ninth Circuit.

BRIEF IN SUPPORT THEREOF
and
NOTICE OF MOTION.

FISCHER & FISCHER,
HARTLEY F. PEART,
IRA S. LILLICK,
Proctors for Petitioner.

No. 689

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1919

THE WESTERN FUEL COMPANY
(a corporation),
Petitioner,

vs.

ANTONE GARCIA, as administrator of the estate of Manuel Souza, deceased,
Respondent.
(Libelant below)

IN THE MATTER OF THE LIBEL OF ANTONE GARCIA, AS ADMINISTRATOR OF THE ESTATE OF MANUEL SOUZA, DECEASED, V. THE WESTERN FUEL COMPANY.

Petition under the Act of Congress of March 3rd, 1891, of The Western Fuel Company, a corporation, respondent and appellant in Case No. 689 on the records of the Supreme Court of the United States, for a Writ of Certiorari to the United States Circuit Court of Appeals, for the Ninth Circuit, commanding that it certify before the Supreme Court of the United States the entire record in that certain proceeding, to-wit: No. 3195 on the records of said Court of Appeals.

PETITION TO THE SUPREME COURT OF THE UNITED STATES, UNDER THE ACT OF CONGRESS OF MARCH 3, 1891,

For Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Edward Douglass White, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, The Western Fuel Company, a corporation, respondent and appellant in Case No. 689 on the records of this court—the proceeding being questions certified to this court in Case No. 3195 on the records of the United States Circuit Court of Appeals, for the Ninth Circuit—presents this, its petition for a writ of certiorari addressed to the United States Circuit Court of Appeals, for the Ninth Circuit, commanding said court, and the clerk thereof, to certify to the Supreme Court of the United States, the record and proceedings in that certain case pending before it, entitled: The Western Fuel Company (a corporation), appellant, v. Antone Garcia, as administrator of the estate of Manuel Souza, deceased, appellee. The same being No. 3195 on the records of said Court of Appeals, together with its opinion in said case, for the review and determination of said cause by the Supreme Court of the United States, as provided in Section VI of the Act of Congress approved March 3, 1891; and your petitioner respectfully represents, as follows:

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I.

That certain questions arising from the record in the above proceeding, No. 3195 on the records of the United States Circuit Court of Appeals, for the Ninth Circuit, were heretofore, by the said Court of Appeals, duly certified to the Supreme Court of the United States for its decision thereof—the same being on the records of this court, the above numbered proceeding 689—for the October term of 1919.

II.

That there are other questions arising from such record—No. 3195 on the records of said Court of Appeals—which have not been so certified,—upon none of which has the said Court of Appeals expressed an opinion—each of which questions is material and may need to be decided before the rights of the respective parties to the aforesaid proceeding can be determined finally.

III.

That there is but little controversy in said proceeding regarding any fact—on the contrary, the facts as stated in the certificate of the said Court of Appeals need but little amplification.

Souza, the deceased, was familiar with the work of unloading coal, and had on many occasions acted

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as hatch tender for a gang, looking out for the tub, watching for falling coal as the tub was hoisted, and warning the members of the gang in such event. The machinery used by The Western Fuel Company was the most modern, and best adapted for its purpose, known. At the time of the accident, coal was being unloaded by the stevedores from the hold of the vessel, and was being cleaned up from around the interior edges of the vessel by the use of a bucket with rollers underneath it. This bucket was attached to a wire rope, and when loaded was, on a signal from the hatch tender, hoisted some 70 feet in the air above the deck of the vessel to where it hung suspended by 10 or 12 feet of cable from a yard-arm. The engineer in charge of the power then released the gravity control and the bucket ran in on a carrier over the hopper. The hopper, or wooden container, extended about 12 feet from the side of the bunker, and had a lip about 8 feet wide. The bucket, about 3½ feet square, and about 3 feet high at its highest point, when suspended from the yard-arm properly, clears the lip of the hopper by about 2 feet, and swings in some 6 feet from the lip. The bucket is equipped with a contrivance which dumps it by the pull of a clutch. This clutch is pulled by a dump-man standing next the hopper. The libelee Nelson was performing this work at the time of the accident.

On the day of the accident, August 5, 1916, two gangs of stevedores were at work unloading coal. Souza was a member of one gang, the members of

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which were near the hatch at which another gang was working, shortly before 12 o'clock on the day of the accident. Souza's gang was getting ready to go to work, and the other gang were getting ready to quit. Souza went down a little ahead of the time for him to go to work, to take the place of a friend of his, in the other gang, in order that the friend might change his clothes. A bucket was filled, attached to the cable, hoisted and dumped just as all the other buckets were handled; and in the process of dumping, a quantity of coal, varying in amount according to the different witnesses, spilled from the hopper; one or more of the pieces hitting Souza on the head, resulting in his death.

All the witnesses for the libelant agreed in stating that coal is constantly falling, and that the work is dangerous. Souza had worked in unloading coal for years, and had himself been a hatch tender on many occasions. One of the hatch tender's duties is to warn the members of his gang of falling coal.

The trial court found and the finding was approved by the Circuit Court of Appeals that the accident was caused by the negligence of the dump man and the hatch tender.

IV.

That it is the contention of petitioner that in admiralty no cause of action exists to recover dam-

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ages for death through negligence, and that, in order to enable libelant to recover in this case, the right of action must be founded upon the statutes of the State of California. The Statutes of the State of California relating to the matter, so far as is here material, read as follows:

Code of Civil Procedure, Section 377, is as follows:

> "Section 377. When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

This section so far as actions by employees was concerned was amended by Civil Code Section 1970, reading as follows:

> "Section 1970. An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee, or unless the employer has neglected to use ordinary care in the selection of the culpable employee; provided nevertheless, that the employer shall be liable for such injury when the same results from

the wrongful act, neglect, or default of any agent or officer of such employer, superior to the employee injured, or of a person employed by such employer having the right to control or direct the services of such employee injured, and also when such injury results from the wrongful act, neglect or default of a co-employee engaged in another department of labor from that of the employee injured, or employed upon a machine, railroad train, switch-signal point, locomotive-engine, or other appliance than that upon which the employee is injured is employed, or who is charged with dispatching trains, or transmitting telegraphic or telephonic orders upon any railroad, or in the operation of any mine, factory, machine-shop, or other industrial establishment.

"Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such employer shall not be a bar to recovery for any injury or death caused thereby, unless it shall also appear that such employee fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures, and thereafter consented to use the same, or continued in the use thereof.

"When death, whether instantaneous or otherwise, results from an injury to an employee received as aforesaid, the personal representative of such employee shall have a right of action therefor against such employer, and may recover damages in respect thereof, for and on behalf, and for the benefit of the widow, children, dependent parents, and dependent brothers and sisters, in order or precedence as herein stated, but no more than one action shall be brought for such recovery.

"Any contract or agreement, express or implied, made by any such employee to waive

the benefits of this section, or any part thereof, shall be null and void, and this section shall not be construed to deprive any such employee or his personal representative, of any right or remedy to which he is now entitled under the laws of this state.

"The rules and principles of law as to contributory negligence which apply to other cases shall apply to cases arising under this section, except in so far as the same are herein modified or changed."

In 1911 the California legislature passed the so-called Roseberry Act (Stats. 1911, page 796) which provides in part:

"Section 1. In any action to recover damages for a personal injury sustained within this state by an employee while engaged in the line of his duty or the course of his employment as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent, or servant of the employer, the fact that such employee may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee, and it shall be conclusively presumed that such employee was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employees contributed to such employee's injury; and it shall not be a defense:

"(1) That the employee either expressly or impliedly assumed the risk of the hazard complained of.

"(2) That the injury or death was caused in whole or in part by the want of ordinary or reasonable care of a fellow-servant.

"Section 2. No contract, rule or regulation, shall exempt the employer from any of the provisions of the preceding section of this act."

The sections of the Statute of Limitations of the State of California pertinent to this case are in the Code of Civil Procedure.

C. C. P., Section 340, Subdivision 3, is as follows:

"Within One Year:

"3. An action for libel, slander, assault, battery, false imprisonment, seduction or for injury to or for the death of one caused by the wrongful act or neglect of another or by a depositor against a bank for the payment of a forged or raised check."

C. C. P., Section 355, is as follows:

"If an action is commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, the plaintiff, or if he die and the cause of action survive, his representatives, may commence a new action within one year after the reversal."

V.

On the foregoing facts material questions of law arise; those certified by the Circuit Court of Appeals of the Ninth Circuit are as follows:

1. Are the statutes of the State of California, conferring the right of action for wrongful death, to be applied in libels in admiralty for wrongful death?

2. If the state statutes do apply, are they to be applied with all their incidents abolishing or modifying the common law defenses of assumption of risk, contributory negligence and the negligence of a fellow servant? or

3. Does the state statute merely give the right of action and leave for application the rules of maritime law covering personal injuries thus doing away with any distinction heretofore recognized between actions for personal injuries not resulting in death and actions for wrongful death sanctioned by state statutes?

And, in our opinion, the following further questions:

4. Are the recognized principles of maritime law modified and changed from state to state in the enforcement of state statutes conferring a right of action for wrongful death?

5. Is there any distinction in the consistent and uniform body of maritime law in the principles governing actions for personal injuries not resulting death, and actions for wrongful death?

6. If the incidents of the statutes of the State of California conferring the right of action for wrongful death with their modifications and abolishments of the defenses of negligence of fellow servant, assumption of risk, and contributory negligence, are to be held to apply in libels in admiralty for wrongful death, should not the statute of limitations of the state also be held to apply?

Petitioner has at all times contended that:

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The right of action for personal injuries resulting in death being given by the state statute, a court in admiralty will enforce it, but enforce it in accordance with the recognized principles of maritime law unaffected by the provisions of any state or local law; that the maritime law in actions for wrongful death, as well as in actions for personal injuries not resulting in death, recognizes and applies the defenses of negligence of fellow servant, assumption of risk, and contributory negligence.

The trial court held that the right of action in this case was given by the state statute of California, but that such statute must be applied with all its incidents abolishing and modifying the defenses specified and found that the death of Souza was due to the negligence of the dumpman and the hatch-tender; that the delay in bringing the present action for more than one year after the death of Souza was accounted for so as to remove the bar of the statute of limitations (Apostles pages 159 to 161, inclusive).

On appeal, the Circuit Court of Appeals expressly held that the right of action for the death of the deceased being given by the California statute, the court in admiralty would enforce it, but enforce it in accordance with the recognized principles of the maritime law unaffected by the provisions of any state or local law, and that for this reason the California statute of limitations of one year had no application to the case, and approved the find-

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ings of fact of the trial court that the death of Souza was caused by the negligence of the dumpman and the hatch-tender, and that the deceased was not guilty of any contributory negligence. And found that the deceased had not assumed the extraordinary risk which resulted in his death (Apostles, pages 198-199).

On rehearing the Circuit Court of Appeals reversed the judgment of the court below and directed the dismissal of the action holding that the death of the deceased was due to the negligence of his fellow servants, viz.: the winch-driver and the hatch-tender. It will be noted that Circuit Judge Ross dissented from the order granting appellee's petition for rehearing and vacating and setting aside the decree reversing the judgment appealed from (Apostles, page 209).

The foregoing contentions are not for the first time made—on the contrary, by oral argument and by briefs filed, each of the said contentions was pressed upon the attention of the District Court, and the said Court of Appeals.

The questions certified by the Court of Appeals touch only the questions stated, and the questions not certified, that is, Questions 4, 5, and 6, we deem to be material and important. In the event that the decision of this court on the questions certified shall be adverse to appellee, and the decree in his favor be finally reversed by the said Court of Appeals, contention might be made that the Statute of Limitations of this state did not

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apply. If this court determines that the court in admiralty will not only enforce a right of action for wrongful death given by a state statute, but will enforce it with all its incidents such as the abolition of the defense of negligence of fellow servant, should not the state statute of limitations logically be included as such an incident to be applied? In such event does not the proviso as to limitation likewise attach to the right of action itself?

If, on the other hand, the entire record be ordered certified to this court, all of the questions material to a final decision may be considered at the same time, and a decree be thereupon entered that shall be final.

In the certificate, neither the statutory provisions of the State of California, which need be considered, nor certain facts, that need be considered when the court is deciding the contentions stated in Questions 4, 5, and 6 hereof, are set forth; and we respectfully submit that in the absence of the entire record in the proceeding referred to, the questions above stated, and not certified by the said Court of Appeals, cannot be determined advisedly. If those questions be not material to the decision of the case referred to, then it must follow that the said certificate of the Court of Appeals presents the entire case for this court's decision; which, we submit, may not be so done properly.

And your petitioner prays that on a presentation and consideration of this petition, a writ of

certiorari be ordered issued from this Honorable Court addressed to the United States Circuit Court of Appeals for the Ninth Circuit, and the clerk thereof, commanding said court, and the clerk thereof, to certifiy to the Supreme Court of the United States the entire record in the proceeding pending before it, entitled, Western Fuel Company, a corporation (respondent), appellant, v. Antone Garcia, as administrator of the estate of Manuel Souza, deceased (libelant), appellee; No. 3195 on the records of said Court of Appeals, together with its opinion therein, for the review and determination of said cause by the Supreme Court of the United States, as provided in Section VI of the Act of Congress approved March 3, 1891; and your petitioner further prays that, pending a hearing had on said record so to be ordered certified, no hearing be had on the said questions heretofore certified to this Honorable Court by said Court of Appeals:

And your petitioner will ever pray, etc.

Dated, San Francisco,
February 9, 1920.

FISCHER & FISCHER,
HARTLEY F. PEART,
IRA S. LILLICK,
Proctors for Petitioner.

No. 689

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1919

THE WESTERN FUEL COMPANY
(a corporation),

Petitioner,

vs.

ANTONE GARCIA, as administrator of the estate of Manuel Souza, deceased,

Respondent.
(Libelant below)

BRIEF ON BEHALF OF THE WESTERN FUEL COMPANY, PETITIONER, FOR A WRIT OF CERTIORARI

From the Supreme Court of the United States to the United States Circuit Court of Appeals for the Ninth Circuit.

THE RIGHT OF ACTION IS CONFERRED BY STATE STATUTE.

In admiralty no cause of action exists to recover damages for death through negligence.

This court after a review of numerous conflicting decisions in the lower courts has held that in the

absence of federal or state legislation giving a right of action therefor, a suit in admiralty cannot be maintained to recover damages for a death caused by wrongful act or negligence on the high seas or navigable waters, in accordance with the principle now well established, that by the common law no civil action lies for an injury which results in death.

1 C. J., 1289.

Where by a state act a right of action is conferred upon the personal representatives of a deceased person to recover damages for his death when caused by the wrongful act, neglect, or default of another, if the tort has occurred on any navigable waters, the courts of admiralty have jurisdiction; this is no departure from the general rule that state laws can neither extend nor restrict the jurisdiction of the admiralty courts, for such a statute merely creates a right, which is separate from the remedy to be enforced in the proper tribunal.

1 C. J., 1290.

> "Under the general maritime law, there is no right of recovery for negligence resulting in death on the high seas or upon navigable waters. The right of action dies with the person and his representatives have no remedy against the individual or the thing which caused his death. This, as is well known, is also the rule of the common law. * * * Congress has never enacted a law to govern similar torts, and the admiralty and maritime jurisdictions in

such matters is controlled by the general maritime law, except as affected by the statutes of a state."

Benedict, 4th Ed., Section 235.

Resort must therefore be had to the state statutes to find a right of action in the libelant.

The statutes of California, mentioned in the petition, confer a right of action for wrongful death.

These state statutes, however, modify and abolish the defenses of negligence of fellow servant, assumption of risk and contributory negligence.

THE STATE STATUTE OF LIMITATIONS.

The state statute of limitations, moreover, if applied, would bar the action.

The statute of limitations, as found in the Code of Civil Procedure of the State of California, Section 340, was pleaded in the exceptions to the original libel and the same section and the plea of laches was alleged in the exceptions to the first amended libel. It will be borne in mind that the first amended libel upon which this cause proceeded to trial contained for the first time, Garcia as administrator, as the libelant. The original libel filed by the widow and her children through their guardian *ad litem*, was filed more than one year after the death of Souza, and the cause of action is therefore barred under the law of California.

"A suit in admiralty to recover damages for death, brought by virtue of a state statute, is governed by the provisions of the statute on which the right of action rests; e. g., the provisions of the statute regulating the time within which such suit must be brought."

Benedict's Admiralty, 4th Ed., Sec. 240,

citing:

Stern v. La Comp. Gen. Trans., 110 F. R. 996;

The A. W. Thompson, 39 F. R. 115,

and other cases.

"While courts of admiralty are not bound by local statutes, in determining the question of laches they govern themselves by the analogies of the common law or statutory limitations, in the absence of special or exceptional circumstances"

1 C. J., 1329, Note 30.

"The only reason why statutes of limitation are regarded in the admiralty at all is that they furnish a convenient measure of staleness. They represent, or ought to represent the settled opinion of the community, as to when there should be an end of litigation, and are therefore more reliable than the views of a judge applied to a peculiar situation."

Davis v. Smokeless Fuel Co., 182 Fed. 1004.

"The policy of statutes of limitation as statutes of repose must be respected in courts of admiralty as much as in courts of common law. In the careful brief furnished by the libelant no case is cited where any suit has been sustained after the lapse of the statutory period."

Nesbit v. The Amboy, 36 Fed. 925;

The Southwark, 128 Fed. 149.

"Where a state statute creating a lien or right of action limits the time within which a proceeding thereon may be begun admiralty will observe the limitation."

The Edith, 94 Fed. 518;

The James G. Swan, 106 Fed. 94;

The Catherine Whiting, 99 Fed. 445;

The H. N. Emilie, 70 Fed. 511.

"Where a cause of action rests wholly on a state statute which requires suits founded thereon to be commenced within a limited time, the proviso as to time attaches to the right of action itself and runs with the statute into the admiralty courts."

Stern v. La Comp. Gen. Trans., 110 Fed. 996.

The libelant alleges the proceedings taken before the Industrial Accident Commission and that through writ of review at the instance of the libelee Western Fuel Company the award was annulled on August 6, 1917. The accident and death of Souza were alleged and proved as of August 5, 1916. The original libel brought by the heirs of Souza was filed August 21, 1917; the first amended libel brought by the administrator was filed three days before the trial.

C. C. P., Section 355, is as follows:

"If an action is commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, the plaintiff, or, if he die and the cause of action survive, his representatives, may commence a new action within one year after the reversal."

This section was construed in the case of

Fay v. Costa, 2 Cal. App. 241,

wherein it was held in passing upon this very question of statute of limitations, that a writ of review was not an action within the meaning of C. C. P., Section 355. The court said:

> "The judgment in question here was not 'reversed on appeal,' but was annulled and set aside on a writ of review and in order to uphold the action of the trial court we are asked to hold that a reversal on appeal includes an annulling on a writ of review. * * * Our code, in the section just cited (C. C. P., Section 1066) uses the word 'appeal' as indicating something different from a writ of review. While to some minds it may be difficult to suggest a reason why the legislature, in the case of a reversal on appeal, should provide that a new action may be brought, and not when the same result is secured by a writ of review, it seems to be so written. * * * We do not think that we are justified in construing the word 'appeal' as used in Section 355 of the Code of Civil Procedure, as including a writ of review. For the reasons above set forth, the demurrer should have been sustained."

Petition for rehearing in this case was denied in the District Court of Appeal on December 21, 1905, and a petition to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on January 22, 1906.

The libelant plainly bases his excuse for failing to bring the action seasonably upon the proceedings which were improperly taken before the Indus-

trial Accident Commisison, but under the decision last quoted it is shown that the reliance upon C. C. P., Section 355, is ill-founded.

Just as in the case of Fay v. Costa, there was no appeal, but the award in favor of Mrs. Souza was annulled by writ of review, the only remedy available to the Western Fuel Company in the state courts.

In his opinion Judge Dooling on this subject says (Apostles p. 160):

> "As the beneficiaries here were for a year engaged in the prosecution of their supposed rights under the Workman's Compensation Act, their delay in bringing the present action is accounted for so as to remove the bar of limitations. Fill v. Cunard Co., 217 Fed. 84."

If this authority is to be relied upon as establishing the principle that excuse existed for the delay in resorting to the admiralty court by reason of the pendency of the proceedings before the Industrial Accident Commission and the state court, nevertheless there is an entire failure to excuse the commencement of the action by the proper party, viz., the administrator. This was specifically attacked in the exceptions filed to the first amended libel.

The Circuit Court of Appeals held that this state statute of limitations did not apply because the court of admiralty would enforce the right of action

for the death of the deceased (given by the state statute) in accordance with the recognized principles of maritime law unaffected by the provisions of any state or local law.

THE CHARACTERISTIC FEATURES OF THE ADMIRALTY LAW MAY NOT BE MATERIALLY INTERFERED WITH BY STATE STATUTES.

The state statutes are to be resorted to only to ascertain whether a right of action is conferred.

In

Southern Pacific Co. v. Jensen, 244 U. S. 205,

this court said:

> " 'Considering our former opinions, it must now be accepted as settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country * * * And further, that in the absence of some controlling statute, the general maritime law, as accepted by the Federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction.' Concerning extent to which the general maritime law may be changed, modified, or affected by state legislation, this was said: 'No such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. These

purposes are forcefully indicated in the foregoing quotations from The Lottawanna (Rodd v. Heartt) 21 Wall. 558; 22 L. ed. 654.' Among such quotations is the following: *'One thing however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulations of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states'."* (The italics are ours.)

The deceased stevedore was injured and killed aboard ship while engaged in the performance of a maritime contract of employment.

It is now well settled that the contract of a stevedore is maritime and is governed by the maritime law when the injury occurs aboard ship.

Atlantic Transport Co. v. Imbrovek, 234 U. S. 52;

Swayne & Hoyt v. Barsch, 226 Fed. 581.

THE CASE IS GOVERNED BY THE MARITIME LAW.

The law is now well settled and a long list of decisions may be cited in support thereof. A few follow:

The Lottawanna, 21 Wall. 558; 22 L. Ed. 654;

Workman v. Mayor of N. Y., 179 U. S. 555;

S. P. Co. v. Jensen, 244 U. S. 205;
Chelentis v. Luckenbach S. S. Co., 243 Fed. 536; U. S. Adv. Opinion 1917-8, p. 590;
Union Fish Co. v. Erickson, U. S. Adv. Opinion 1918-9, p. 143;
The City of Alexandria, 17 Fed. 390;
The City of Norwalk, 55 Fed. 98; affirmed 61 Fed. 364;
Schuede v. Zenith S. S. Co., 216 Fed. 566;
Tropical Fruit S. S. Co. v. Towle, 222 Fed. 867.

In a number of decisions the courts have so expressly stated that the maritime law will be administered without regard to the rules of law enacted by state legislatures that it may be well to call attention to the specific language employed.

In

Welch v. North Cambria, 40 Fed. 655,

the court said

"* * *. The states have no power to interfere with the admiralty system of laws".

In

The Chusan, Fed. Cas. 2717,

the court said:

"In the exercise of this admiralty and maritime jurisdiction, the courts of the United States are exclusively governed by the legislation of Congress, and in the absence thereof, by the general principles of the maritime law. The states have no right to prescribe the rules by which the courts of the United States shall act, nor the jurisprudence which they shall administer."

In

Mack S. S. Co. v. Thompson, 176 Fed. 499,

the court said (p. 504):

> "We think the maritime law subsists as an entirety as the subject of federal jurisprudence, and is to administered by the federal courts *without impairment by state legislation.* If changes are to be made in it, it must be done by federal authority." (Italics ours.)

In

The H. B. Hyde, 195 Fed. 312,

it was said:

> "The maritime law, which the libelant invokes, cannot be altered, modified, or changed by state enactment. The right of action arising out of a maritime tort, relating to the recovery of damages for personal injuries, depends upon the maritime law, which has been adopted by the laws and usages of the country."

The foregoing decision was expressly approved by the court in

Swayne & Hoyt v. Barsch, 226 Fed. 581,

the court saying that the rule there announced *"is well settled"*.

The trial court found and the Circuit Court of Appeals approved the finding:

> "That the death of Souza was caused by the negligence of the hatch-tender in withdrawing the bucket from the hopper before it was fully dumped, and to his negligence in not giving warning to those in the hold where Souza was working as a stevedore and killed."

THE MARITIME LAW.

Under the maritime law "unaffected" in the language of the decisions, "by the provisions *of any state or local law*," there is no liability for an injury sustained by or through the negligence of a fellow servant.

The fellow servant rule was stated to be a governing principle in admiralty in

Olson v. Oregon Coal & Nav. Co., 104 Fed. 574,

Judge Ross saying:

> "It is very clear that upon common-law principles the owner would not be liable for an injury sustained by one of such employees by reason of the negligence of one of his co-employees, whatever his grade in the common employment. In the recent case of Railroad Co. v. Conroy, 175 U. S. 323; 20 Sup. Ct. 85, Adv. S. U. S. 85; 44 L. Ed. 181, where the case of Railroad Co. v. Ross, 112 U. S. 377; 5 Sup. Ct. 184; 28 L. Ed. 787, was finally and squarely overruled, the supreme court announces the true rule to be, both upon principle and authority, 'that the employer is not liable for an injury to one employee occasioned by the negligence of another engaged in the same general undertaking; that it is not necessary that the servants should be engaged in the same operation or particular work; that it is enough to bring the case within the general rule of exemption if they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes; or, in other words, if the services of each in his particular sphere or department are directed to the accomplishment of the same

general end.' It is true that the present case is to be determined, not by the common law, *but by the rules of the maritime law; but that law, as was shown very clearly, we think, by Judge Brown in the case of The City of Alexandria, supra, is, in respect to the facts here presented, the same.* See also, the cases of The Queen (D. C.), 40 Fed. 694; The Frank and Willie (D. C.), 45 Fed. 494; The City of Norwalk (D. C.), 55 Fed. 98; Steamship Co. v. Merchant, 133 U. S. 375; 10 Sup. Ct. 397; 33 L. Ed. 656. The judgment is affirmed." (Italics ours.)

The same governing principle was followed by the court in the following cases:

The Troop, 128 Fed. 858;

The Westport, 136 Fed. 391;

The C. S. Holmes, 220 Fed. 273.

All of the District Judges of the Ninth Circuit have followed these decisions upon this point.

In

The Rosalie Mahony, 218 Fed. 695,

Judge Cushman applied the rule to the case of a stevedore injured aboard ship. He there said:

"Even if it were conceded that the load put upon the truck was unusually high and large, and that that fact contributed to its falling, yet would the act of so loading the truck be the act of a fellow servant. Olson v. Oregon Coal & Navigation Co., 104 Fed. 574; Hermann v. Port Blakely Mill Co., (D. C.), 71 Fed. 853. * * * Libelant contends that the case of Olson v. Oregon Coal & Navigation Co. is not controlling, because in that case the vessel was being navigated at sea and not being loaded

> within the state's jurisdiction; *but the decision clearly holds that the maritime law and the common law in respect to the fellow servant rule are the same*, and the chief case relied upon as authority by the court in Olson v. Oregon Coal & Navigation Co. was Quinn v. Lighterage Co., (C. C.), 23 Fed. 363, where libelant was injured through the negligence of the master of the vessel in giving a premature order and setting the winch in motion while the vessel was being loaded." (Italics ours.)

In

> Hermann v. Port Blakely Mill Co., 71 Fed. 853 (p. 863),

Judge Morrow, for the reason that the injury was caused by the negligence of a fellow servant, dismissed a libel brought by one engaged in loading the "Kate Davenport," saying:

> "In my judgment, the libelant in this case was injured through the negligence of a co-employe, who, in law, is deemed to be a fellow servant, and not a vice-principal. The employer discharged his full duty towards libelant when he provided a competent person to give the warning signals. Having done that, his responsibility for any injury sustained through the negligence of such co-employe to libelant was protected by the general rule which exempts employers from liabilty for injuries sustained through the negligence of fellow servants. Libelant, by his contract of employment, impliedly assumed all the ordinary risks of the business in which he was engaged, among which the negligence of fellow servants is recognized as one of the risks."

See also,

Bowes v. Baumert, No. 3155 Circuit Court of Appeals, Ninth Circuit (not yet reported).

There is no distinction in principle, nor we believe to be found in precedent, in the application in admiralty of the doctrine of the defense of negligence of fellow servant, between actions for personal injuries not resulting in death and actions for wrongful death.

If such a distinction is now to be drawn, will the proper harmony and uniformity and the characteristic features of the general maritime law be maintained? Will not the different modifications made by the various state statutes in their incidents relating to various defenses inevitably destroy such harmony and uniformity?

If such incidents to state statutes are to be applied by the court of admiralty, must it not logically also apply, the further incident of the state provision limiting the time within which the action may be commenced.

Dated, San Francisco,
February 9, 1920.

Respectfully submitted,

FISCHER & FISCHER,
HARTLEY F. PEART,
IRA S. LILLICK,
Proctors for Petitioner.

No. 689

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1919

THE WESTERN FUEL COMPANY
(a corporation),
Petitioner,

vs.

ANTONE GARCIA, as administrator of the estate of Manuel Souza, deceased,
Respondent.
(Libelant below)

NOTICE OF MOTION.

To Antone Garcia, as administrator of the estate of Manuel Souza, deceased, respondent in the foregoing petition; and to C. M. Bradley, Esq., and Henry Heidelberg, Esq., proctors for said respondent:

You, and each of you, are hereby given notice that the Western Fuel Company, petitioner in the foregoing petition, will, at the courtroom of the Supreme Court of the United States, in the Capitol

Building, at the City of Washington, D. C., and on the opening of said court on Monday, the ~~first~~ 22nd day of March, 1920, or so soon thereafter as proctors for said petitioner in said matter may be heard; present the foregoing petition to said Supreme Court, and thereupon move the said court for an order that the writ of certiorari in said petition prayed for be issued, and that the prayer of said petition be granted.

Dated, San Francisco,
February 9, 1920.

FISCHER & FISCHER,
HARTLEY F. PEART,
IRA S. LILLICK,
Proctors for Petitioner.

Supreme Court, U. S.
FILED
SEP 27 1921
JAMES D. MAHER,
CLERK

No. 28

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1921

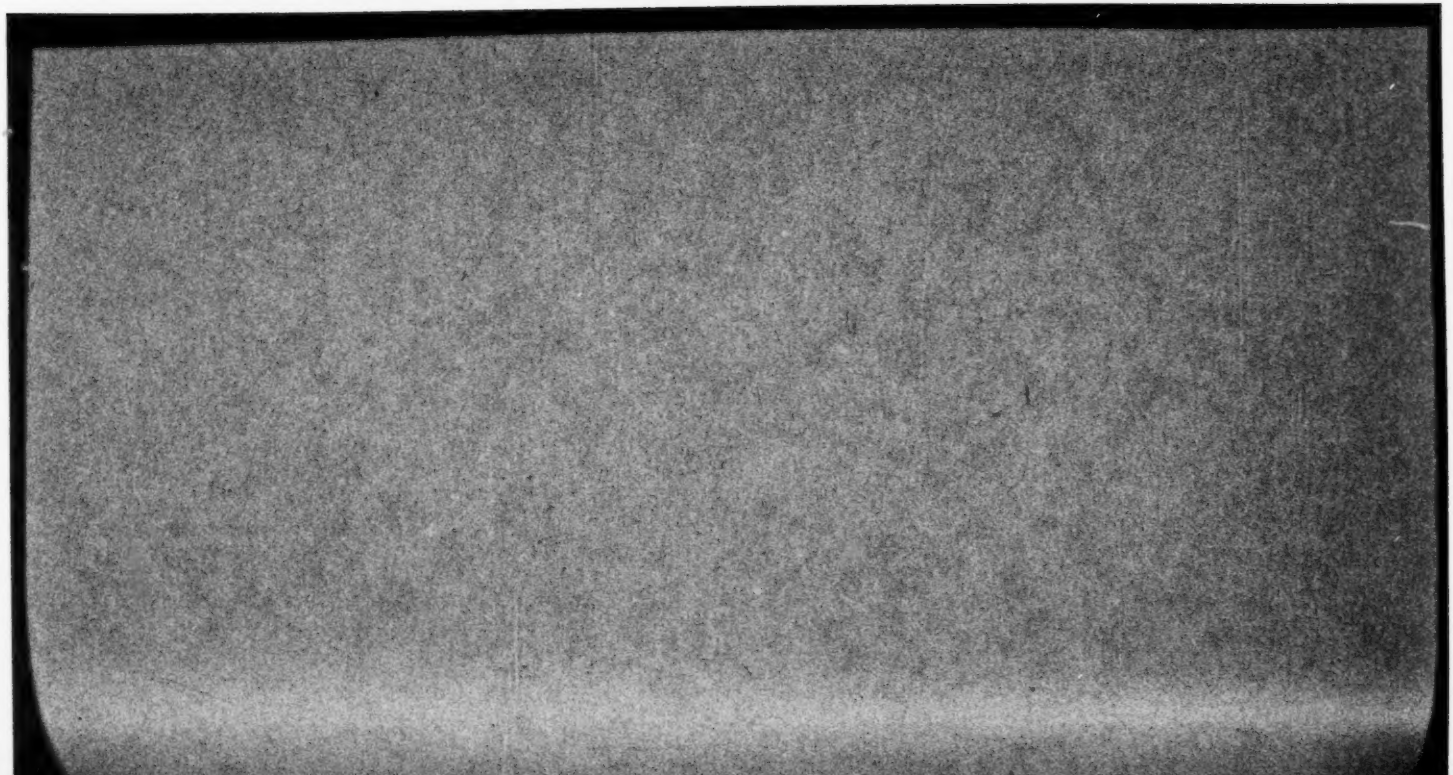
WESTERN FUEL COMPANY
(a corporation),
Petitioner,

vs.

ANTONE GARCIA, as administrator of the estate of Manuel Souza, deceased,
Respondent,
(Libelant Below).

BRIEF FOR RESPONDENT (Libelant below).

CHRISTOPHER M. BRADLEY,
HENRY HEIDELBERG,
Proctors for Respondent.



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No. 28

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1921

WESTERN FUEL COMPANY
(a corporation),

Petitioner,

vs.

ANTONE GARCIA, as administrator of the estate of Manuel Souza, deceased,

Respondent,
(Libelant Below).

BRIEF FOR RESPONDENT (Libelant below).

Statement of Facts.

Manuel Souza, a citizen of the State of California, while at work as a stevedore unloading coal from the Steamer "Tancred", anchored in Oakland Creek alongside the wharf of the Western Fuel Company, was killed August 5th, 1916, by reason of a large quantity of coal being negligently dumped

upon him from a bucket at a great height into the hold of the ship where he was working.

On August 24th, 1916, the widow of Manuel Souza made application for the payment of compensation to her by the appellant under the terms of the Workmen's Compensation, Insurance and Safety Act of California, Chapter 176, Laws of 1913. This application was filed on behalf of herself and five minor children of tender age, one being a posthumous child. An award was made in her favor by the State Industrial Accident Commission, and *this award was paid in installments by the Western Fuel Company for a period of one year and one day, or until the 6th day of August, 1917,* when the appellant had the aforesaid award annulled by the Supreme Court of California on the ground that the State Industrial Accident Commission had no jurisdiction in view of the decision of this court in the case of *Southern Pacific Company v. Jensen,* 244 U. S. 207, *decided May 21st, 1917.*

Thereafter, and on August 21st, 1917, a libel was commenced for wrongful death in the District Court of the United States for the Northern District of California, Southern Division. The widow and five children were awarded judgment against the Western Fuel Company for the sum of $10,000, less $494.00, which had been theretofore paid, as aforesaid.

The District Court made the following findings upon the trial of the case:

1. The death of Souza was due to the negligence of Hayes in withdrawing the bucket from the hopper before it was fully dumped and to the negligence of the hatch-tender in not giving warning to those in the hold.

2. The deceased was not guilty of contributory negligence in being where he was, as there was coal there to be discharged and he was preparing to discharge it.

3. Nor did the risk of his employment include the dumping of the quantity of coal that fell through the hatch at the time of the accident, even though it be conceded that he assumed the ordinary risk of his employment due to the occasional falling of a lump of coal.

The Western Fuel Company appealed to the Circuit Court of Appeals for the Ninth Circuit. That court on the 3rd day of February, 1919, affirmed the judgment of the lower court.

Thereafter the Western Fuel Company petitioned the said Circuit Court for a rehearing of the above entitled case, which was granted, and the Circuit Court of Appeals on the 6th day of October, 1919, reversed its former finding and held that the widow and children were without remedy, basing their decision upon the case of *Southern Pacific Company v. Jensen, supra.*

On the 30th day of October, 1919, the said Circuit Court granted a petition for further rehearing filed by proctors for Antone Garcia, etc., vacated their former judgment of reversal, and certified the case to this court for the answering of the three questions now before this court, argument

upon which was had before this court on the 18th day of March, 1921.

Proctors for the Western Fuel Company had theretofore, and on the 9th day of February, 1920, filed a petition to the Supreme Court of the United States for a *writ of certiorari*. This petition was denied.

After the argument before this court, on the 18th day of March, 1921, this court granted a *writ of certiorari* and asked that the entire record in this case be certified, presumably so that the entire facts in controversy might be before the court.

We will show that the Circuit Court of Appeals, in reversing their former affirmation of the decision of the lower court, which reversal they based entirely upon *Southern Pacific Company v. Jensen*, was erroneous, as we will show that the case of *Southern Pacific Company v. Jensen* has no application whatever to this case.

Respondent's Position as to the Law Applicable in This Case.

For purposes of argument, we may concede that a remedy at common law and in admiralty has always existed for a tort not resulting in death, and it might be that if suit is brought by libel proceedings in admiralty for personal injuries not resulting in death, admiralty law analogous to common law should be applied. This might be so

because the existence of a state law is unnecessary. The remedy exists and has always existed, by reason of the common law, and no state law is brought before the court.

It, of course, will be admitted that there is no recovery for wrongful death at common law or in admiralty, unless given by a state statute. Therefore, when suit is brought by libel proceedings for the recovery of damages for wrongful death, such proceedings can be maintained only because of the existence of a state statute (in this instance Sec. 1970 Civil Code of California), and the recovery should be in accordance with the substantive law laid down in that statute.

It is our contention that Section 1970 of the Civil Code of the State of California warrants recovery in this case, and said section is full and complete in its terms and any recovery based upon such statute should be entirely in accordance therewith.

It will be noticed that this statute grants a right of recovery to the representative of the deceased man acting on behalf of the widow and orphans where the deceased was in the employ of the master at the time of his death. We contend that the modifications of the fellow-servant law in favor of respondent should be applied. That we concede, as we do, that wherever the state law conflicts with the "characteristic" features of admiralty law, the state law must give way in favor of admiralty law, in no measure militates against our contention.

It is our contention that Section 1970 of the Civil Code, and its modifications of the fellow-servant law, violates no "characteristic" features of admiralty law, for the reason that it is in relation to recovery for wrongful death, and that there was no common law or admiralty law upon that subject.

We claim that the rule of laches should be applied as the law of limitations of actions in this case, for the reason that admiralty has as one of its "characteristics" the law of laches, which is the law of that *forum*.

We know of no better way to discuss the matter before the court than to take up in the order named the questions certified to this court. The first question is:

"ARE THE STATUTES OF THE STATE OF CALIFORNIA COVERING THE RIGHT OF ACTION FOR WRONGFUL DEATH TO BE APPLIED IN LIBELS IN ADMIRALTY FOR WRONGFUL DEATH?"

We will not consume much space in argument of this question, as it has been admitted by our opponents that that question should be answered in the affirmative (see p. 7 of Brief for Western Fuel Company, filed on the 17th day of March, 1921). That this is so is borne out by

Deslions v. La Compagnie, Gen. Trans., 210 U. S. 95; 52 L. Ed. 973;

The Hamilton, 207 U. S. 398; 52 L. Ed. 264;

Monongahela River, etc., v. Schinnerer, 196 Fed. 1019;
Maryland v. Miller, 194 Fed. 775;
Atlantic Transport Co. v. Maryland, 193 Fed. 1019;
Aurora Shipping Co. v. Boyce, 191 Fed. 960;
Trauffler v. Detroit, 181 Fed. 256.

Question two is as follows:

"IF THE STATE STATUTES DO APPLY ARE THEY TO BE APPLIED WITH ALL THEIR INCIDENTS ABOLISHING OR MODIFYING THE COMMON LAW DEFENSES OF ASSUMPTION OF RISK, CONTRIBUTORY NEGLIGENCE AND THE NEGLIGENCE OF A FELLOW SERVANT?"

Owing to the findings of the District Court, which have been affirmed twice by the Circuit Court of Appeals, we will not argue the questions of contributory negligence or the assumption of risk, for the reason that the findings themselves expressly state that the facts of this case show that there was no contributory negligence on the part of the deceased, nor was there any assumption of risk on his part.

As we have previously stated, the widow and children in this action base their right of recovery entirely upon Section 1970 of the Civil Code of the State of California, which is as follows:

"Sec. 1970. When employer not bound to indemnify employee.

An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee, or unless the employer has neglected to use ordinary care in the selection of the culpable employee; *provided, nevertheless, that the employer shall be liable for such injury when the same results from the wrongful act, neglect or default of any agent or officer of such employer, superior to the employee injured, or of a person employed by such employer having the right to control or direct the services of such employee injured, and also when such injury results from the wrongful act, neglect or default of a co-employee engaged* in another department of labor from that of the employee injured, or employed *upon a machine,* railroad train, switch-signal point, locomotive-engine, *or other appliance than that upon which the employee is injured is employed,* or who is charged with dispatching trains, or transmitting telegraphic or telephonic orders upon any railroad, or in the operation of any mine, factory, machine-shop, or other industrial establishment.

Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such employer shall not be a bar to recovery for any injury or death caused thereby, unless it shall also appear that such employee fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures, and

thereafter consented to use the same, or continued in the use thereof.

When death, whether instantaneous or otherwise, results from an injury to an employee received as aforesaid, the personal representative of such employee shall have a right of action therefor against such employer, and may recover damages in respect thereof, for and on behalf, and for the benefit of the widow, children, dependent parents, and dependent brothers and sisters, in order of precedence as herein stated, but no more than one action shall be brought for such recovery.

Any contract or agreement, express or implied, made by any such employee to waive the benefits of this section, or any part thereof, shall be null and void, and this section shall not be construed to deprive any such employee or his personal representative, of any right or remedy to which he is now entitled under the laws of this state.

The rules and principles of law as to contributory negligence which apply to other cases shall apply to cases arising under this section, except in so far as the same are herein modified or changed."

The court will readily see that this is a complete law in itself, applicable to the facts and circumstances of this case, and the court will also see that the doctrine of fellow-servant negligence, contributory negligence and assumption of risk have not been abrogated in California by this statute, but have simply been modified. *The court will also observe that there is no time limitation expressed in the statute itself.*

Courts of admiralty, having no law of their own for recovery in wrongful death cases, have heretofore held that recovery in such cases should be in accordance with state statutes, going so far in the following cases as to hold

> *"that where contributory negligence bars recovery under state statute that contributory negligence, if any, will bar recovery in the admiralty courts where the action is brought by virtue of a state statute".*
>
> *Cornell Steamboat Co. v. Fallon,* 179 Fed. 283;
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> *Gretschmann v. Fix,* 189 Fed. 716;
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> *Robinson v. Detroit, etc.,* 73 Fed. 883;
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> *Stern v. La Compagnie, etc.,* 110 Fed.;
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> *Monongahela River, etc. v. Schinnerer,* 196 Fed. 375;
>
> *A. W. Thompson,* 35 Fed. 115.

This is in disregard of the general admiralty rule of comparative negligence.

The *Monongahela* case contains the following quotation from *Ex-parte McNiel,* 13 Wall. 236-242; 20 L. Ed. 624:

> "A state law cannot give jurisdiction to any federal court; but that is not a question in this case. A state law may give a substantial right of such a character that, where there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be a court of equity, *of admiralty,* or of common law. The statute in such cases does not confer the jurisdiction. That exists already and it is invoked to give effect to the right by applying

> the appropriate remedy. This principle may be laid down as axiomatic in our national jurisprudence. *A party forfeits nothing by going into a federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations as if it had been brought in the proper state tribunal of the same locality. In no class of cases has the application of this principle been sustained by this court more frequently than in those of admiralty and maritime jurisdiction.*" (Italics ours.)

Also, in the case of *Quinette v. Bisso et al.*, 136 Fed. 825, the question of what state laws would be given effect in admiralty in a case of wrongful death was passed on, and the law of the case is stated in the syllabus:

> "An action in admiralty for wrongful death, based on Civ. Code L. Art. 2315, is governed by the local law with respect to the defense of contributory negligence."

Further:

> "A federal court, in administering a state statute giving a right of recovery for wrongful death will follow the decisions of the highest court of the state with respect to the measure of damages."
>
> COURT. "Without this statute the libelant could not maintain her libel. The statute must be applied in admiralty just as if the suit had been brought in the state courts, and any defenses which are open to the defendant under the jurisdiction of the state, if successfully maintained, will bar recovery under the libel."

Judge Brown, in *The City of Norwalk,* 55 Fed. 98, has taken up the questions involved in question two, and has written an exhaustive opinion thereon. That case was affirmed in 61 Fed. 364, and the Circuit Court of Appeals commented upon the excellence of the opinion written by Judge Brown.

Because of the completeness of the decision in the above case and because of its analogy to the questions herein involved, we insert the following excerpts from *The City of Norwalk,* 55 Fed. 98:

The administratrix sued by libel to recover damages for death of her husband, who lost his life through collision between a tug and The City of Norwalk. The accident happened in the channel between Blackwell's Island and Long Island shore, within the State of New York.

The court says in paragraph 3, page 102, in regard to the application of state laws in regard to the defense of contributory negligence:

> "The right of action conferred by statute is upon condition that the deceased, if living, might himself have maintained an action for his damages. By the law of this state the plaintiff's contributory negligence bars his recovery; and such contributory negligence, if found, must therefore, bar any recovery by the administratrix in an action in this court based upon the state statute. The Harrisburg, 119 U. S. 199, 214; 7 Sup. Ct. Rep. 140; The A. W. Thompson, 39 Fed. 115."

However, the court found against the defense of contributory negligence, under all the facts.

Paragraph 4, page 103:

> "It is further contended that there can be no recovery for loss of life in this court, because there is no liability therefor under the general maritime law of this country (citing cases), and because, as it is said, it is not competent for state legislation, (1) to change the law in maritime cases, or (2) to extend the jurisdiction of a court of admiralty so as to authorize it to enforce a new and purely statutory cause of action."

The court then comments upon the importance of the question, and first reviews the early cases holding that libels *in rem* will not be enforced, and then, in the next paragraph cites the more modern cases, "in which the validity of such state statutes and the jurisdiction of a court of admiralty to enforce them *in personam* have been considered and upheld" (citing cases, page 103).

After citing other cases to the same effect as aforesaid, the court says, on page 104:

> "And in the Supreme Court, although the question has been several times referred to, without adjudication, yet in the last case on the general subject (The Corsair, 145 U. S. 335, 347; 12 Sup. Ct. Rep. 949), both the validity of such state legislation and the jurisdiction of the state courts to enforce it by libel in personam seem directly affirmed. Mr. Justice Brown, in delivering the opinion of the court, says:
>
> "'If it (the local law) merely gives a right of action of a maritime nature, the District Court may administer the law by proceedings *in personam*.' Page 347, 145 U. S., and page 952, 12 Sup. Ct. Rep."

The court on page 104 continues:

"But the validity of judgments giving damages in the state courts in such cases and the validity of the statutes on which they were founded, have been twice directly and expressly adjudged: First, in Steamboat Co. v. Chase, 16 Wall. 522, and afterwards in Sherlock v. Alling, 93 U. S. 99. These suits arose on writs of error to judgments in the state courts of Rhode Island and Indiana for deaths in collision cases like the present, based upon similar statutes of those states. In the former case, the validity of the act was attacked as an encroachment on the admiralty and maritime power of congress; in the latter, as an encroachment on the commercial power. In both cases the validity of the statutes was upheld. In the latter, the careful opinion delivered by Mr. Justice Field contains what seems to me a full answer to all objections against the authority of the states to pass statutes of this character. He says:

" 'The act "only declares a general principle respecting the liability of all persons within the jurisdiction of the state for torts resulting in the death of the parties injured. And in the application of the principle it makes no difference where the injury complained of occurred in the state, whether on land or on water. General legislation of this kind, prescribing the liabilities or duties of citizens of a state, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce. Objection might with equal propriety be urged against legislation prescribing the form in which contracts shall be authenticated, or property descend or be distributed on the death of its owner, because applicable to the contracts or estates of persons engaged in such commerce * * *. But

with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels *the laws of congress are silent, and the laws of the state govern. The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the state to which the vessels belong; and it may be said, generally, that the legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit.* In our judgment, *the statute of Indiana falls under this class.* Until congress, therefore, makes some regulation touching the liability of the parties injured, *we are of opinion that the statute of Indiana applies, giving a right of action in such cases to the personal representatives of the deceased;* and that, as thus applied, it constitutes no encroachment upon the commercial power of congress".' Pages 103-104.

"Aside from the grant of power to regulate foreign and interstate commerce, the Constitution, it must be remembered, contains no direct grant to congress of legislative power over the maritime law. Its authority upon that subject, over and above the power derived from the commercial clause, though no doubt now firmly established (Butler v. Steamship Co., 130 U. S. 527, 9 Sup. Ct. Rep. 612; In re Garnett, 141 U. S. 1, 14, 11 Sup. Ct. Rep. 840) rests upon implication only.

"The grounds of this implication, briefly stated, are that the Constitution, in extending

the judicial power to all cases of maritime jurisdiction, presupposes a certain body of maritime law as its necessary attendant; that this law is not only a matter of interstate and international concern, but requires, also, harmony and consistency in its administration, and hence cannot be subject to defeat or impairment by liability to the diverse legislation of numerous states; and that it cannot be supposed that the states, in parting with all control over the judicial administration of maritime causes, intended to reserve to themselves a general legislative power over the same subject; and that congress must, therefore, be the only body competent to make any needed changes in the general rules of the maritime law.

"*This view, however, does not exclude state legislation upon matters of merely local concern, which can be much better cared for under state authority, and which have always been thus cared for; nor does it exclude general legislation by the states, applicable alike on land and water, in their exercise of the police power for the preservation of life and health, though incidently affecting maritime affairs;* provided that such legislation does not contravene any acts of congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations. The long established doctrine in the supreme court has been that in this field of 'border legislation', state laws are valid until congress interposes, and thereby excludes further state legislation. The Lottawanna, 21 Wall. 558, 581; Cooley v. Port Wardens, 12 How. 299; County of Mobile v. Kimball, 102 U. S. 691, 697-699; Bowman v. Railroad Co., 125 U. S. 507, 8 Sup. Ct. Rep. 689, 1062; Leisy v. Hardin, 135 U. S. 100, 120-122, 10 Sup. Ct. Rep. 681; Manchester v. Massachusetts, 139

U. S. 240, 266, 11 Sup. Ct. Rep. 559; Ficklen v. Taxing District, 145 U. S. 1, 12 Sup. Ct. Rep. 810. There is no reason why local state legislation should be deemed any more restricted by the *implied* power of congress over maritime legislation, than it is by the *express* grant of the *commercial* power. That the rule should be the same on each subject was intimated by Chief Justice Marshall in U. S. v. Bevans, 3 Wheat. 385, and by Mr. Justice Curtis in Smith v. State of Maryland, 18 How. 71, 76. The subject has been but little discussed, as compared with the frequent review of the commercial power of congress and its limitations.

"The instances, however, in which *new legal rights* created by state authority in maritime affairs, have been recognized and enforced, are numerous and diverse. They embrace—First, liens for supplies to domestic vessels (The Lottawanna, 21 Wall. 558); second, liens for master's wages (The Mary Gratwick, 2 Sawy. 342, affirmed by Mr. Justice Field; The Louis Olsen, 52 Fed. Rep. 652; The J. E. Rumbell, (March 6, 1893) 13 Sup. Ct. Rep. 498); third, liens for damages for refusing to load under a charter (The J. F. Earner, 22 Fed. Rep. 342, by Mr. Justice Brown); fourth, liens for double wharfage, (The Virginia Rulon, 13 Blatchf. 519); fifth, actions for half pilotage where a pilot's services were refused (Ex parte McNiel, 13 Wall. 236, and Ex parte Hagar, 104 U. S. 520, re-affirming Cooley v. Port Wardens, supra); sixth, liens for expenses of seamen at a quarantine hospital (The Wensleydale, 41 Fed. Rep. 829); seventh, regulations as to rivers, harbors, and wharves (County of Mobile v. Kimball, supra; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 2 Sup. Ct. Rep. 185; Transportation Co. v. Parkersburg, 107 U. S. 691, 701-704, 2 Sup. Ct. Rep. 732; Packet Co. v. Keokuk, 95 U. S. 80; Packet

Co. v. Aiken, 121 U. S. 444, 7 Sup. Ct. Rep. 907; Steamship Co. v. Pennsylvania, 122 U. S. 326, 346, 7 Sup. Ct. Rep. 1118; eighth, penalties imposed for the protection of fisheries (Manchester v. Massachusetts, supra; Smith v. State of Maryland, 18 How. 71); ninth, quarantine laws (Morgan's L. & T. R. & S. S. Co. v. Louisiana Board of Health, 118 U. S. 455, 6 Sup. Ct. Rep. 1114); tenth, regulating the charges of floating elevators (Budd v. New York, 143 U. S. 517, 12 Sup. Ct. Rep. 468); eleventh, establishing and regulating ferries (Gibbons v. Ogden, 9 Wheat. 1, 203; Conway v. Taylor, 1 Black, 603; Wiggins Ferry Co. v. City of East St. Louis, 107 U. S. 365, 2 Sup. Ct. Rep. 257; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 204, 214-217, 5 Sup. Ct. Rep. 826).

"Besides these new rights created, of so diverse a character, there are many other local regulations established under state authority, concerning the navigation of rivers and harbors, anchorage grounds, port wardens, navigation about piers and slips, and wharf and ferry privileges, which give birth to many specific rights that are constantly recognized and enforced in the trial of admiralty causes. These acts rest either upon the police power of the states, or on the local nature of the subject, and the absence of any legislation by congress on the same matter. Gloucester Ferry Co. v. Pennsylvania, supra. They show that over quite a wide range of local interests, state legislation is competent to deal with purely maritime subjects, and to create rights and duties which must be recognized in admiralty causes, though they may not change any of the characteristic principles of the maritime law.

"*Still further, it must be borne in mind that the maritime law is not in itself a complete and perfect system.* In all maritime courts there

is a considerable body of municipal law that underlies the maritime as the basis of its administration. *Strictly speaking, the maritime law is that alone which is peculiar to, or which specially concerns, maritime transactions. The general body of the law as regards the ordinary, fundamental rights of persons and property, whether on land or sea, is, as observed by Mr. Justice Field in the passage above quoted, derived from the constituted order of the state, i. e. from the municipal law,* which courts of admiralty to a considerable extent must necessarily adopt and follow, subject only to the modifications which the special characteristics of the law of the sea impose on maritime subjects. *The general rights and regulations of persons and property are subject to the control of the state and may be changed as the state sees fit, if they are not regulated by congress and do not trench upon its exclusive authority.* The administration of the law in the maritime courts of different countries, therefore, though it might be the same in all that is peculiar to the maritime law, might in other respects differ widely, through the differences in the municipal law which in part enters into the adjudication of maritime causes.

"It was upon the recognition of this principle alone, as I understand, that in the case of The Harrisburg, 119 U. S. 199, 213, 7 Sup. Ct. Rep. 140, it was decided that no action could be maintained in a court of admiralty of this country for loss of life, aside from statutory authority; namely, because there is no rule on this subject belonging specially to the maritime law as such. 'It (the maritime law) leaves the matter untouched.' Page 213, 119 U. S., and page 146, 7 Sup. Ct. Rep. And since the maritime courts in each country follow their own municipal law as regards giving damages for death; and inasmuch as by the common

law of this country such a cause of action does not survive,—the latter rule must, therefore, obtain in our courts of admiralty. In other words, it is the municipal law that on such a point determines the law applicable in a court of admiralty.

"There seem, therefore, to be at least three classes of subjects (none of them affecting, however, what is peculiar to the general maritime law, or touching its international or interstate relations), in which state legislation is competent to affect the rights of parties in courts of admiralty, in the absence of legislation by congress, viz.: (1) In the establishment of the general rights of persons and property within the state limits; (2) in the exercise of the police power; (3) in certain local regulations of a maritime nature.

"*The statute of this state which authorizes a recovery of 'the pecuniary damages', 'in behalf of a widow, husband, children or next of kin', falls within each of the above classes.* (1) *It is a general law of personal rights, not specially directed to commerce or navigation, but applying alike on sea or shore;* (2) *it is within the police power; for it is a 'statute intended to protect life.'* (Huntington v. Attrill, 146 U. S. 657, 675, 13 Sup. Ct. Rep. 224) through one of the most effectual of all sanctions, viz., by imposing on the offender a liability to pay a pecuniary indemnity; while in the interest of the public, it also tends to avert the dependency or pauperism of the survivors by shifting the burden of their support, in part at least, from the community to the authors of the wrong; (3) *it is local in its scope and interferes in no way with any needful uniformity in the general law of the seas, or with international or interstate interests.* Its validity, therefore, as applied to maritime affairs within the state limits, seems to me clear."

The above case was appealed to the Circuit Court of Appeals, Second Circuit, and after reviewing the facts, Judge Lacombe, Circuit Judge, says on page 367, 61 Fed.:

> "The case of the administratrix against the owners of the two vessels presents some further questions. It is contended that a libel *in personam* for damages for loss of life under the statute cannot be maintained in admiralty. *This objection has been most exhaustingly discussed by the learned district judge,* and all the authorities bearing upon it stated and analyzed. *There is nothing to add to his disposition of the question except to say that we fully concur therein.*"

The judgment of the court below, however, was modified by the Circuit Court of Appeals to the extent that the upper court did not concur in the decision of the lower court on the branch of the case having to do with the defense by the Norwalk Steamboat Company that the death was caused by the negligence of a fellow servant, reversing that part of the decree which dismissed the libel against the Norwalk Steamboat Company, remanding the case with instructions to decree against that company for an additional one-half the statutory damages.

THE MODIFICATIONS OF THE FELLOW SERVANT RULE, AS LAID DOWN IN SEC. 1970 OF THE CIVIL CODE AND AS ADJUDICATED BY THE SUPREME COURT OF THE STATE OF CALIFORNIA, SHOULD BE FOLLOWED BY ALL FEDERAL COURTS.

"Sec. 721. Rev. Stats. U. S.—the laws of the several states, except where the constitu-

tion, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decisions in trials at common law, in the courts of the United States where they apply."

B. & O. v. Baugh, 149 U. S. 368 (cited in S. P. Co. v. Jensen, page 542);
Elliott v. Felton, 119 Fed. 270.

This, of course, has been reiterated time without number by this court, and especially where the question involved was a modification of the fellow servant doctrine.

Questions as to liability of master for injuries to his servants caused by negligent acts of fellow servants, is a matter which state legislatures may regulate.

L. & N. R. Co. v. Mellon, 218 U. S. 36; 30 S. Ct. 676; 54 L. ed. 921;
Mobile etc. R. Co. v. Turnipseed, 219 U. S. 35; 31 S. Ct. 136; 55 L. ed. 78.

When the subject is regulated by state statute, decisions of highest courts of state on questions arising thereunder are controlling upon federal courts.

Oakes v. Mase, 165 U. S. 363; 17 S. Ct. 345;
Proctor & Gamble v. Williams, 183 Fed. 695.

The above rule has been specifically applied to the question of what classes are within operation of statutes modifying the fellow servant rule.

Nor. Pac. R. Co. v. Hambly, 154 U. S. 349; 38 L. ed. 1009;
Kibbe v. Stevenson Iron Co., 136 Fed. 147;

U. S. Leather Co. v. Howell, 151 Fed. 444;
Atlantic etc. Co. v. Farmer, 176 Fed. 692.

California courts have construed Sec. 1970, Civil Code, with regard to the winchman and hatchtender:

(a) Hayes, the engineer or winchman, was at work on shore on an appliance other than that upon which Souza was working and therefore his negligence, which was really the cause of the accident, was the negligence of the employer.

Sec. 1970, Civil Code of California;
Korander v. Penn. Bridge Co., 16 Cal. App. 249.

(b) The negligence of the hatchtender, or foreman, is the negligence of the employer.

Sec. 1970, Civil Code of California;
Brown v. Sennett, 68 Cal. 225;
Foutz v. City of Los Angeles, 167 Cal. 487.

(c) Though it be held by this court, contrary to California law, that the hatchtender or foreman and the stevedore were fellow servants, there can be no question that the engineer or winchman, working on shore and not under a maritime contract of hire, was not a fellow servant, and, therefore, the major negligence of the engineer concurring with the minor negligence of the hatchtender would not relieve the master from liability.

Rjasko v. Penn. Coal Co., 241 Fed. 248;
Pick v. Central Pacific R. Co., 78 Cal. 38;
Carnegie Steel Co. v. Yukasz, 224 Fed. 438;
New Aetna, etc. Co. v. Holt, 231 Fed. 611.

The hatchtender is a foreman of stevedores.

Apostles on Appeal, pages 56, 59 and 61;
Brown v. Sennett, 68 Cal. 225.

As the above cases show, this court and federal courts have repeatedly applied adjudications by the Supreme Courts of state statutes in modification of the fellow servant doctrine. That federal courts, sitting as courts of admiralty, also look to the state laws to govern them in their conclusions as to who are fellow servants, is shown by the following authority:

Trauffler v. Detroit & Cleveland Navigation Co., 181 Fed. 262;

where it is said:

> "It may be doubted whether the master, the engineer and the fireman were fellow servants, but, *assuming that in the occupation of towing the steamer to her dock such relationship in admiralty or at common law existed, we must, as already pointed out, in this case look to the law of the state to guide us in our determination.* By the employer's liability act of the State of New York (chapter 600, Laws 1902), it is expressly provided that an employee or his representatives shall not be deprived of their remedies against the employer where the negligent act was committed by any person in the service of the employer intrusted with the duty of superintendence or whose sole or principal duty was that of superintendence. By analogy a master who has sole charge of the navigation of a tug peculiarly exercises the principal duties of superintendence, and I think it may therefore be held that the libelants have a right of

recovery against the Princeton, and, moreover, that both the tug and the steamer may be held. *Hayward v. Key,* 138 Fed. 34, 70 C. C. A. 402; *Sweet v. Perkins,* 196 N. Y. 482; 90 N. E. 50; *The Hamilton,* supra."

See

Siebert v. Patapasco Shipbuilding Co., 253 Fed. 685.

In this case, while the certificate of the Circuit Court of Appeals states that the death of Souza was caused by the negligence of fellow servants, it is the contention of respondent that this is an erroneous statement. In substantiation of this we ask the court to read the findings of the lower court heretofore stated. But even if the hatchtender and winchman were fellow servants at common law with the deceased Souza, still under 1970 of the Civil Code of this state and under the adjudications of the State Supreme Court based thereon, the negligence of the hatchtender and the winchman would still be the negligence of the master.

See

Korander v. Penn. Bridge Company, 16 Cal. App. 249;

Brown v. Sennett, 68 Cal. 225.

The third question is:

"DOES THE STATE STATUTE MERELY GIVE THE RIGHT OF ACTION AND LEAVE FOR APPLICATION THE RULES OF MARITIME LAW COVERING PERSONAL INJURIES, THUS DOING AWAY WITH ANY DISTINCTION HERETOFORE RECOGNIZED BETWEEN AN ACTION FOR PERSONAL INJURIES NOT RESULTING IN DEATH AND AN ACTION FOR INJURIES RESULTING IN DEATH?"

The very wording of this question admits that heretofore there has been a distinction between actions for personal injury not resulting in death and those resulting in death, and this is borne out by the case of *Schuede v. Zenith S. S. Co.*, 216 Fed. 571, the court saying:

> "We are not in conflict with the long line of cases cited and examined, dealing with deaths resulting from marine torts, and in which state laws are applied in proceedings in admiralty as well as in actions at law in State and Federal courts. * * * In admiralty no remedy exists for a death resulting from a marine tort. In Cornell Steamboat Co. v. Fallon, 179 Fed. 293 (Circuit Ct. of Appeals, Second Circuit), a death case, action at law under the New York modification of Lord Campbell's Act, it was pointed out that decedent, a seaman injured in the service of his vessel, had he lived to sue either at law or in admiralty, would have had his rights determined by the maritime law affecting his contract of employment, whereas, his administratrix was privileged to use the state law."

It may be contended that the *Schuede* case was not an admiralty case and hence states no admiralty law. However, the excerpt above is from *Cornell*

Steamboat Co. v. Fallon, which was an admiralty case.

This court in *Chelentis v. Luckenbach*, has recently laid down the rules which should govern in cases of recovery by seamen injured on high seas for personal injury in which it was stated that only wages, maintenance and cure could be recovered for personal injuries in admiralty cases. It will at once be seen by the court that none of these remedies would be sufficient or applicable in a death case. Of course, in a death case the wages immediately cease; there is no maintenance, and obviously no cure. Therefore, the contention that the same laws should be applied in death cases as are applied to personal injury cases, would seem absurd.

That there is a line of demarcation between death cases and personal injury cases, we think has been amply demonstrated, and we have also shown that admiralty courts will accept the state laws with all burdens and it therefore follows that respondent should be entitled to all benefits, and it so happens that Judge Dooling, who was the presiding judge in the District Court sitting in the trial of this case, has laid down the above doctrine.

See

Bjolstad v. Pac. Coast S. S. Co. et al., 244 Fed. 634;

and see also

Ex parte McNiel, 13 Wall. 236-242; 20 L. Ed. 624 (previously quoted),

where Mr. Justice Field says:

"A party forfeits nothing by going into a federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations as if it has been brought in the proper state tribunal in the same locality. In no class of cases has the application of this principle been sustained by this court more frequently than in those of admiralty and maritime jurisdiction."

JENSEN CASE HAS NO APPLICATION

The *Jensen* case had nothing whatever to do with *wrongful* death and lays down no rule concerning applicability of state statutes by a court of admiralty in suits for *wrongful* death.

The Circuit Court of Appeals, we most respectfully contend, erroneously said in its opinion upon rehearing:

> "The numerous preceding and *conflicting decisions* of both federal and state courts with respect to the provisions of state statutes at variance with the general maritime law in suits for personal injuries were finally disposed of by the decision of the Supreme Court in the case of Southern Pacific Co. v. Jensen, 244 U. S. 205, so that we think it is unnecessary to make further reference to those cases. The Jensen case grew out of the *alleged wrongful death* of a person, *a right of action* for which was given by a state statute." (Italics ours.)

Southern Pacific Co. v. Jensen, 244 U. S. 205, did not grow out of alleged *wrongful death*, nor was a "right of action" given by the state compensation statute in question.

It had nothing to do with alleged *wrongful* death. No element of tort was involved therein. No item of wrong was alleged, tried or adjudicated. No claim of any kind was made as for alleged *wrongful* death.

The above being true, there is an analogy between the *Jensen* case and the case at bar, and, therefore, the *Jensen* case is no authority for decision in the instant case, and there exists the same distinction as has always existed and has always been recognized between actions in admiralty for personal injuries resulting in death and actions in admiralty not resulting in death.

The Jensen case and the N. Y. Compensation Law analyzed.

The *Jensen* case arose under the Workmen's Compensation law of the State of New York, *and not otherwise.* It seems necessary, therefore, in order to demonstrate the true meaning of the *Jensen* decision, to go to the very foundation of the New York statute.

This has already been done by the Supreme Court of the United States in *New York Central R. Co. v. White*, 243 U. S. 187; 61 L. Ed. 667.

In that case the constitutionality of the Workmen's Compensation Act of New York, upon which the liability in the *Jensen* case was later founded, was under review, and the court, speaking through *Mr. Justice Pitney*, thoroughly analyzes the Compensation Act of New York and sums it up, on page 674, 61 L. Ed., as follows:

> "Briefly, the statute imposes liability upon the employer to make compensation for disability or death of the employee resulting from accidental personal injury arising out of and in the course of the employment, *without regard to fault as a cause*, except where the injury or death is occasioned by the employee's wilful intention to produce it, or where the injury results solely from his intoxication while on duty."

The Supreme Court of the United States, in the above decision, at page 671, 61 L. Ed., cites the constitutional amendment upon which the Workmen's Compensation Act of New York is founded, which is as follows:

> "Section 19. Nothing contained in this Constitution shall be construed to limit the power of the Legislature to enact laws for the protection of the lives, health or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries *without regard to fault as a cause thereof*, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty, or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation, or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting

> from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer."

Southern Pacific v. Jensen followed the decision in the case of *New York Central v. White,* and the Supreme Court of the United States simply affirmed in the *Jensen* case their previous holding in the *White* case, the court saying in the *White* case:

> "The scheme of the act is so wide a departure from common-law standards respecting the responsibility of employer to employee that doubts naturally have been raised respecting its constitutional validity."

If the whole decision in the *White* case is read it will only strengthen the citations of the excerpts above given, and appellee's assertion that the *Jensen* case does not apply to the case at bar, will be fortified.

Liability under the New York statute to pay stated amounts for accidental death was fixed as an economic measure without regard to fault, negligence, wrong or tort. Compensation statutes of the various states are worded similarly, as, for instance, the California statute:

> "Sec. 6. Liability for the compensation provided by this act, in lieu of any other liability whatsoever to any person, *shall, without regard*

> *to negligence,* exist against an employer for any injury sustained by his employee arising out of and in the course of the employment and for the death of any such employee, * * *."

The only suggestion in the New York statute of fault or wrong is in the exception covering wilful intention of the employee to bring about his death.

In the *Jensen* case that could mean nothing else than suicide of the man *Jensen.* No such suggestion was ever made in any tribunal before which the case came. Neither was it suggested that Jensen was intoxicated at the time of his death, which is the only other provision of the constitutional amendment which might import the idea of fault.

This much is certain, that the liability of the employer is fixed irrespective of fault. The enactment of the state statute of New York followed the adoption of the constitutional amendment above quoted. This is Section 10 of Chapter 816, Laws of 1913, as re-enacted in 1914:

> "Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation according to the schedules of this article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment, *without regard to fault as a cause of such injury,* except where the injury is occasioned by willful intention of the injured employee to bring about the injury or death of himself or another, or where the injury results solely from intoxication of the injured employee while on duty. Where the injury is

occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty, neither the injured employee nor any dependent of such employee shall receive compensation under this chapter."

It will be noted that the enactment follows the constitutional amendment with great fidelity, and the same comment made above on the constitutional amendment is applicable to the statute.

Can anything be plainer than that the New York statutes under which the *Jensen* case arose and under the facts of that case, as stated in the opinion itself, that the *Jensen* case had nothing whatever to do with *wrongful death* or "alleged *wrongful death*"? **Is it not equally plain, therefore, that the Jensen decision can have no application whatever in this suit for wrongful death?**

The whole decision by the Supreme Court of the United States in the Jensen case was that the New York statute did not provide a "right of action", a "suit" or a "remedy" known to the common law.

Here is the decision in the *Jensen* case:

"Exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the Federal District Courts, 'saving to suitors in all cases the right of a common law remedy where the common law is competent to give it'. *The remedy which the compensation statute attempts to give is of a character wholly unknown to common law, incapable of enforcement by*

the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction."

Under this characterization, where is there given an "action" by the New York state statute? For it is said that the thing given is of a character wholly unknown to the common law. If it were a "suit" or "action" it would not be so far removed from the common law as to be such an utter stranger to it.

So the *Jensen* case only holds that the New York compensation statute does not provide a "suit" or "action" to cover a claim for compensation, which holding is directly opposed to what was stated by the Circuit Court of Appeals in the decision of this case upon rehearing.

The *Jensen* case itself fully and wholly recognizes the proposition that there was in the case no suggestion of "alleged wrongful death", which is contrary to the statement made by that court in the decision of the case at bar.

Mr. Justice McReynolds states in the *Jensen* case:

> "Compensation is to be made *without regard to fault* as a cause of the injury, except where it is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or another, or results solely from his intoxication while on duty. *Compensation is not based on the rule of damages applied in negligence suits, but, in addition to providing for medical, surgical or other attendance or treatment and funeral expenses it is based solely on loss of earning power."* * * *

The protest of the prevailing opinion in the *Jensen* case was against encroachment upon admiralty jurisdiction, not by the character and enforcement of liability for a tortious death, but upon the fixture of an obligation unknown, in either substance or form, to the common law, and after all the reasoning of the opinion, the actual decision is found near the end of it in the quotation from the case above set forth.

We, therefore, have in the New York constitutional amendment, in the New York statute and in the decisions in the *White* and *Jensen* cases emphatic and express negatives of the language of the Circuit Court of Appeals in the opinion upon rehearing and upon which erroneous view that court turned its entire decision in its final discussion of the case.

The *Jensen* case holds further: The general maritime law may be changed, modified or affected by state legislation, saying:

> "That this may be done to some extent cannot be denied (citing instances) * * * and the right given to recover in death cases (citing cases). * * * See The City of Norwalk, 55 Fed. 98, 106."

As a last word, before discussing the statute of limitations, we most respectfully assert that there are no decisions in "conflict" with the authorities heretofore cited by us, as no court has ever refused to apply state statutes in wrongful death cases.

STATUTE OF LIMITATIONS.

We are not advised of the reason why this court has asked for the entire record to be certified, but as some reference was made to the statute of limitations in the argument of attorneys for appellant on March 18, 1921, and some reference was made thereto in their brief, we will here state our position in regard to the application of the state statute of limitations.

When the questions were prepared by proctors for respondent, it was thought advisable (to meet the possible wishes of the Circuit Court of Appeals) to incorporate therein a fourth question, and this was done, the question reading as follows:

> **"4. Is the libelant barred by the statute of limitations, or is the admiralty court authorized to entertain the libel upon a showing of sufficient excuse for failure to bring the libel within the time fixed by the general state statute of limitations?"**

The Circuit Court of Appeals saw fit, in its wisdom, to modify the certificate by striking from it the foregoing question, **for the reason that it was clearly shown that all the delay prior to bringing this suit in admiralty was occasioned by the actions of the appellant, Western Fuel Company, and the rule of laches should prevail as the law of the forum.**

It will be remembered in this connection that the Western Fuel Company lulled the widow and children into a sense of security by paying the installments due under the aforesaid award until one day in excess of the statute of limitations for suit in

the California state courts for liability for wrongful death, and that they then took advantage of the *Jensen* case, decided in May of 1917, and on August 6th, 1917, had the award in favor of the widow annulled.

The right given under 1970 of the Civil Code of the State of California has no limitations attached to it as to the length of time in which suit must be brought. The limitation of actions for the State of California is found in another code, to-wit, Section 337 of the Code of Civil Procedure, which provides for a limitation of one year.

The very question thus involved has been passed upon by *Federal Judge Wolverton* in the case of *Gregory v. S. P. Co.*, 157 Fed. 113, in which he held that suit for wrongful death based upon an injury happening in California and based upon the sections of the California law authorizing such recovery, might be enforced in Oregon within two years, notwithstanding the fact that the law of limitation of action for recovery in that case in California was one year, and we ask the court to read the decision of Judge WOLVERTON, as he discusses thoroughly the question here involved.

This action is further supported by *Theroux v. N. P. R. Co.*, 64 Fed. 84:

> "It must be accepted, therefore, as the established doctrine, that where a statute confers a new right which by the terms of the act is enforceable by suit only within a given period, the period allowed for its enforcement is a constituent part of the liability intended

> to be created, and of the right intended to be conferred. **The period prescribed for bringing suit in such cases is not like an ordinary statute of limitations which merely affects the remedy."**

It will be contended by our learned opponents that the statute of limitations of California should apply, and cases may be cited in which such statutes of limitation have been applied, but if the court will read those cases they will find that the law of those states placed a limitation upon the right of recovery by making the statute read "provided" suit is brought within a certain length of time, and the limitation of time for suit will be found within the statute giving the right of suit.

NO SUCH LIMITATION IS CONTAINED IN SECTION 1970, CIVIL CODE OF CALIFORNIA, AND TIME IS NOT MADE THE ESSENCE OF THE RIGHT TO SUE.

This is clearly shown by Gregory v. S. P. Co. (*supra*).

That courts of admiralty recognize the rule of laches in suits of this kind, is shown by a decision of this court in *"The Harrisburg"*, 119 U. S. 96; 30 L. Ed. 362, where Mr. Justice WAITE in construing a statute in which a right of action to sue for death was given "provided" suit be commenced within a limited period, said:

> "The statute creates a new legal liability, with the right to sue for its enforcement, *provided* the suit is brought within 12 months, and not otherwise. The time within which the suit must be brought operates as a limitation

of the liability itself, as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year, and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. * * * Time has been made the essence of this right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statute and the limitations of the remedy are, therefore, to be treated as limitations of the right. *No question arises in this case as to the power of a court of admiralty to allow an equitable excuse for delay in suing, because no excuse of any kind has been shown.*" (Italics supplied.)

Ample excuse for delay was shown in this case.

LIMITATION OF ACTIONS IS A LAW OF THE FORUM AND THE LAW OF THE FORUM GOVERNS WHEN THERE IS A CONFLICT AS TO LIMITATIONS OF ACTIONS.

O'Sullivan v. Felix, 233 U. S. 318; 34 S. Ct. 596; 58 L. Ed. 980;

Curtis v. Metcalf, 259 Fed. 961;

Graham v. Engleman, 263 Fed. 166, 167;

Memphis v. Bd. of Directors, 231 Fed. 217;

Cooper v. Jewell, 233 Fed. 618;

Gregory v. Southern Pacific, 157 Fed. 113; construing California St. of Lim. Sec. 340 & Sec. 377, C. C. P.;

Theroux v. N. P. R. R. Co., 64 Fed. 84;
Chappell v. Thompson, 21 Cal. App. 136;
Lamberton v. Grant (Me.), 48 Atl. 127;
Hutchings v. Lamson, 96 Fed. 720 (CCA);
Underwood v. Patrick, 94 Fed. 468.

The law of laches is a characteristic feature of admiralty law and governs in a suit for negligent death.

The Harrisburg, 119 U. S. 96; 30 L. Ed. 362:

> "Time has been made the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statute and the limitations of the remedy are, therefore, to be treated as limitations of the right. *No question arises in this case as to the power of a court of admiralty to allow an equitable excuse for delay in suing, because no excuse of any kind has been shown."* (Italics supplied.)

A writ of review, such as was the procedure for reviewing the award of the California Industrial Accident Commission is not an appeal and hence no subsequent action could have been maintained in the state court pursuant to Sec. 355, C. C. P., of California.

Fay v. Costa, 2 Cal. App, 241:

The widow and children having been deprived of their right to sue in the state court by reason of the actions of the Western Fuel Co. it became necessary to seek relief in the admiralty courts.

This action was warranted by the facts which brought the case within the purview of admiralty and by the law:

Lincoln v. Cunard S. S. Co., 221 Fed. 622, where it was held that where:

> "Within the time prescribed by state statutes an action at law to recover for personal injuries inflicted by a steamship was brought against the owner in a Federal Court in New York, *but from various causes not chargeable to the fault of plaintiff was delayed for more than two years when it was dismissed for want of jurisdiction* without prejudice, *and a new action in admiralty was commenced at once, the case was so far exceptional that libelant would not be charged with laches to defeat the suit.*"

See also *Fill v. Cunard S. S. Co.,* 217 Fed. 84.

Both the Circuit Court of Appeals and the District Court were entirely satisfied on this point, the District Court saying:

> **"4. As the beneficiaries here were for a year engaged in the prosecution of their supposed rights under the Workmen's Compensation Act, their delay in bringing the present action is accounted for so as to remove the bar of limitations."**

Courts of admiralty are not bound by state statutes in determining the question of laches; they govern themselves by the analogies only, in the absence of special or exceptional circumstances.

1 Corpus Juris, 1329 and cases cited;

Davis v. Smokeless Fuel Co., 182 Fed. 1004 (aff. 196 Fed. 753).

We have heretofore pointed out the special and exceptional circumstances existing in the instant case.

The delay in this action was all caused by the Western Fuel Company. **Is it to profit by the tactics employed?**

There are no "international" or "interstate" questions involved in the matter now before this court, and hence there can be no interference with uniformity of admiralty law if Sec. 1970, Civil Code of California, is applied *in toto.*

It clearly appears from all the pleadings and the admitted facts that this is a case solely between citizens of California; there being a widow and five minor children, residents and citizens of California, on the one side, and the Western Fuel Company, a California corporation, on the other side.

No ship was ever libeled or involved in any way. The "Tancred" has at all times since the accident been free to go on its way without hindrance, and no obstruction to shipping or navigation ever arose.

The ship was under charter to the Western Fuel Company and the decedent, Souza, a citizen of California, was in the employ of that corporation, and it alone was sued by a libel *in personam.*

Had this accident happened to Souza while in the employ of the same corporation and while shoveling coal on shore, no question as to the applicability of Sec. 1970, Civil Code of California, would have arisen.

So the question, therefore, is: Whether Souza being killed while located on a vessel tied to a dock gives this corporation, a creature of the law of California, greater rights of defense than is enjoyed by any other California corporation?

We have shown by an abundance of authority that state laws are applied by admiralty courts in death cases except where they conflict with "characteristic" features of admiralty law in its interstate or international relations.

Will the proctors for appellant point out what "characteristic" law applicable in cases of *wrongful death* is violated if the laws which we contend for are applied? Will they show where any "interstate" or "international" complications will arise, when all the parties herein involved are citizens of California and where the accident happened in California waters?

"Uniformity of Admiralty Law" has become a fetich in this case, without any statement being made as to what uniform laws applicable in a death case have been violated.

We have shown that the rule of laches is a characteristic feature of admiralty courts, applicable in all cases, and that respondent is not guilty thereof, and further, that the law of limitations of actions is a law of the forum, and that the law of the forum rules where there is a conflict.

We realize the necessity of encouraging shipping and navigation, and, of course, labor has rights

equal to shipowners, and we believe, therefore, that uniformity of admiralty law will not be jeopardized and harmonious relations will best be established by the answering of Questions 1 and 2 in the affirmative and Question 3 in the negative.

Dated, San Francisco,
September 21, 1921.

Respectfully submitted,

CHRISTOPHER M. BRADLEY,
HENRY HEIDELBERG,
Proctors for Respondent.

FILED
MAR 16 1920
JAMES D. MAHER,
CLERK.

No. 28

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1919

WESTERN FUEL COMPANY, (a corporation),
Petitioner,

vs.

ANTONE GARCIA, as administrator of the estate of Manuel Souza, deceased,
Respondent.
(Libelant below)

BRIEF ON BEHALF OF RESPONDENT (LIBELANT BELOW) in Opposition to the Issuance of a Writ of Certiorari from the Supreme Court of the United States to the United States Circuit Court of Appeals for the Ninth Circuit.

CHRISTOPHER M. BRADLEY,
Proctor for Respondent.

HENRY HEIDELBERG,
Of Counsel.

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No. 689

In the Supreme Court

OF THE

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BRIEF ON BEHALF OF RESPONDENT (LIBELANT BELOW) in Opposition to the Issuance of a Writ of Certiorari from the Supreme Court of the United States to the United States Circuit Court of Appeals for the Ninth Circuit.

The Writ of Certiorari should be denied and the questions certified should be answered upon the briefs submitted by the petitioner in support of the petition for the writ and this brief in opposition

thereto, as all questions for decision are fully covered by the briefs.

Statement as to Facts.

Although the petition for the Writ of Certiorari contains an exhaustive statement of facts, it is earnestly and respectfully urged that there is not left for the consideration of the court any question of fact, but questions of law alone. The findings of the District Court approved by the Circuit Court of Appeals were as follows:

> **1. The death of Souza was due to the negligence of Hayes in withdrawing the bucket from the hopper before it was fully dumped and to the negligence of the hatch-tender in not giving warning to those in the hold.**
>
> **2. The deceased was not guilty of contributory negligence in being where he was, as there was coal there to be discharged and he was preparing to discharge it.**
>
> **3. Nor did the risk of his employment include the dumping of the quantity of coal that fell through the hatch at the time of the accident, even though it be conceded that he assumed the ordinary risk of his employment due to the occasional falling of a lump of coal.**

Indeed, the foregoing is admitted by the petitioner in the following language on page 5 of the petition:

> **"The trial court found and the finding was approved by the Circuit Court of Appeals that the accident was caused by the negligence of the dump man and the hatch-tender."**

As to Questions of Law.

The certificate sent up by the Circuit Court of Appeals contains a wholly sufficient recital of essential facts, and the questions propounded are entirely broad enough to cover, and do cover fully, the only questions of law about which there can be any doubt in the minds of the Honorable Judges of the Circuit Court of Appeals.

At page 10 of the petition for the writ, the petitioner has assumed to state three additional questions, numbered, respectively, 4, 5, and 6.

Petitioner's question 4 is obviously a mere argumentative quibble, as everything in it is more than covered by the questions sent up.

Question 5 is, in the same sense, wholly surplusage.

As to petitioner's additional question 6: Neither the District Court nor the Circuit Court of Appeals found any difficulty whatever in applying what petitioner is pleased to call "recognized principles of maritime law" and "the consistent and uniform body of maritime law".

In fact, when the writers of this brief prepared the certificate for the Circuit Court of Appeals, it was thought, out of abundant caution and courtesy to the court, advisable to incorporate in the questions to be propounded one covering the point concerning the statute of limitations, and this was done in the following form:

> "4. Is the libelant barred by the statute of limitations, or is the admiralty court authorized to entertain the libel upon a showing of sufficient excuse for failure to bring the libel within the time fixed by the general state statute of limitations?"

The Circuit Court of Appeals saw fit, in its wisdom, to modify the certificate by striking from it the foregoing question, but did not modify it in any other respect.

However, in the appropriate place in this brief, we will deal with the stated question concerning the statute of limitations, not because we admit it is in the case before this court, not because we do not insist that it has been finally passed upon after mature consideration, but again out of abundant caution and courtesy to the court.

Points and Authorities.

I.

COURTS OF ADMIRALTY WILL ENFORCE ALL THE SUBSTANTIVE AND INCIDENTAL RIGHTS CONFERRED BY STATE STATUTES GIVING A RIGHT OF ACTION FOR WRONGFUL DEATH.

All the authorities agree that the general admiralty law afforded no remedy for death.

For an admiralty court to take cognizance of a death case, the action must be founded upon a state statute, and there cannot be cited a single case in an admiralty court of a suit for *wrongful death* in

which the substantive rights conferred by the state statutes have not been enforced with all their incidents.

The first case, and the leading one in the United States, in which suit for wrongful death was allowed by a court of admiralty was *Steamboat Co. v. Chace*, 16 Wall. 522.

Mr. Justice Field says, in plain and emphatic language in *Sherlock v. Alling*, 93 U. S. 99, that state statutes will be enforced in a suit for wrongful death, saying:

> "But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, *the laws of congress are silent, and the laws of the state govern. The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the state to which the vessels belong; and it may be said, generally, that the legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit.* In our judgment, *the statute of Indiana falls under this class.* Until congress, therefore, makes some regulation touching the liability of the parties injured, *we are of opinion that the statute of Indiana applies, giving a right of action in such cases to the personal representatives of the deceased;* and

that, as thus applied, it constitutes no encroachment upon the commercial power of congress." (Italics ours.) (Pages 103, 104.)

The City of Norwalk, 55 Fed. 98, 106-107 (aff'd 61 Fed. 364), discusses the proposition of the enforcement of state statutes in a suit for wrongful death. The opinion is very exhaustive and has been cited and upheld repeatedly, the last instance being in *Southern Pacific Co. v. Jensen*.

In *The City of Norwalk*, 55 Fed. 98, the court said (aff. 61 Fed. 364 (367) Cir. Ct. 2d Circuit, Judge Lacombe):

> "The law administered in the admiralty courts of this country embraces not merely what is peculiar to the maritime law, but also much of the municipal local law, derived from the constituted order of the state and all competent state and national legislation. What is peculiar to the maritime law, or that which by its interstate or international relations would be incompatible with diverse state legislation, can be changed by Congress alone, which by implication, has the general power of legislation on the maritime law. This does not exclude state legislation upon maritime subjects of a local nature, *nor legislation under the police power for the preservation of life or health*, nor incompatible with interstate and international interests in the absence of legislation by Congress. A state statute giving damages for death by negligence, as applied to a negligent collision on navigable waters, within the State does not infringe those conditions, and is valid." (Italics supplied.)

We urgently impress upon the court our desire that this court read pages 106 and 107 of *The City*

of Norwalk, supra, in which the police power of the states is discussed with reference to the protection of the lives of the citizens of the state, and ask this court, in so reading, to have in mind that the Western Fuel Company is a California corporation, the deceased Souza was also a citizen of California, the accident that caused his death occurred in the State of California, and his dependent widow and five minor children are residents and citizens of the State of California.

The following cases hold that state statutes must be enforced in a suit for wrongful death, and that, notwithstanding that comparative negligence is the rule in admiralty, where a suit is brought by virtue of a state statute, if, by the law of that state, contributory negligence bars recovery in the state courts, contributory negligence will bar recovery in the admiralty courts:

Cornell Steamboat Co. v. Fallon, 179 Fed. 283;

Gretschmann v. Fix, 189 Fed. 716;

Robinson v. Detroit, etc., 73 Fed. 883;

Stern v. La Compagnie, etc., 110 Fed. 996;

Monongahela River, etc. v. Schinnerer, 196 Fed. 375.

The last cited case contains the following quotation from *Ex parte McNiel*, 13 Wall. 236-242; 20 L. Ed. 624:

> "A state law cannot give jurisdiction to any federal court; but that is not a question in this case. A state law may give a substantial

right of such a character that, where there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be a court of equity, of admiralty, or of common law. The statute in such cases does not confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy. This principle may be laid down as axiomatic in our national jurisprudence. *A party forfeits nothing by going into a federal tribunal.* Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper state tribunal of the same locality. *In no class of cases has the application of this principle been sustained by this court more frequently than in those of admiralty and maritime jurisdiction.*"

In the case of *Quinette v. Bisso, et al.*, 136 Fed. 825, the question of what state laws would be given effect in admiralty in a case of wrongful death was passed on, and the law of the case is stated in the syllabus:

> "An action in admiralty for wrongful death, based on Civ. Code L. Art. 2315, is governed by the local law with respect to the defense of contributory negligence."

Further:

> "A federal court, in administering a state statute giving a right of recovery for wrongful death will follow the decisions of the highest court of the state with respect to the measure of damages."
>
> COURT. "Without this statute the libelant could not maintain her libel. The statute must

be applied in admiralty just as if the suit had been brought in the state courts, and any defenses which are open to the defendant under the jurisdiction of the state, if successfully maintained, will bar recovery under the libel."

Citing:

The Harrisburg, 119 U. S. 199; 30 L. ed. 358;
The Alaska, 130 U. S. 201; 32 L. ed. 923;
The Oregon, 45 Fed. 62.

It follows, of course, that if defenses can be added by state statute in a court of admiralty, they can thus be taken away, and hence the contention is sound that California state laws as to assumption of risk, contributory negligence and negligence of a fellow servant are applicable in a court of admiralty.

There is a clear line of demarcation between personal injury cases and wrongful death cases.

This was recognized in *Schuede v. Zenith S. S. Co.*, 216 Fed. 571, the court saying:

"We are not in conflict with the long line of cases cited and examined, dealing with deaths resulting from marine torts, and in which state laws are applied in proceedings in admiralty as well as in actions at law in State and Federal courts. * * * In admiralty no remedy exists for a death resulting from a marine tort. In *Cornell Steamboat Co. v. Fallon*, 179 Fed. 293 (Circuit Ct. of Appeals, Second Circuit), a death case, action at law under the New York modification of Lord Campbell's Act, it was pointed out that decedent, a seaman injured in the service of his vessel, had he lived to sue either at law or in admiralty, would have had

his rights determined by the maritime law affecting his contract of employment, whereas, his administratrix was privileged to use the state law."

(The above case was affirmed in 244 U. S. 646; 37 Sup. Ct. Rep. 652; 61 L. ed. 1369.)

The status of fellow servants in an admiralty court will be governed by the provisions of the statute under which suit for death is brought.

Trauffler v. Detroit & Cleveland Navigation Co., 181 Fed. 262:

"It may be doubted whether the master, the engineer, and the fireman were fellow servants, but, assuming that in the occupation of towing the steamer to her dock such relationship in admiralty or at common law existed, we must, as already pointed out, in this case look to the law of the state to guide us in our determination. By the employers' liability act of the State of New York (chapter 600, Laws 1902), it is expressly provided that an employe or his representatives shall not be deprived of their remedies against the employer where the negligent act was committed by any person in the service of the employer intrusted with the duty of superintendence or whose sole or principal duty was that of superintendence. By analogy a master who has sole charge of the navigation of a tug peculiarly exercises the principal duties of superintendence, and I think it may therefore be held that the libelants have a right of recovery against the Princeton, and, moreover, that both the tug and the steamer may be held. *Hayward v. Key*, 138 Fed. 34, 70 C. C. A. 402; *Sweet v. Perkins*, 196 N. Y. 482; 90 N. E. 50; *The Hamilton*, supra."

As the court will note by reference to Section 1970 of the California Civil Code, quoted at pages 6, 7 and 8 of the petition for the writ, the California statute respecting the status of fellow servants is similar in its provisions to the New York statute, which the court mentions in the case last cited.

THE JENSEN DECISION NO AUTHORITY.

Under the heading "The characteristic features of admiralty law may not be materially interfered with by state statutes", petitioner at page 22 of the petition for the writ leans its whole weight on the *Jensen* case, which is the only death case in the books in which admiralty has denied the application in any respect of a state statute conferring the right of recovery, and it did so because that was a case arising under a Workmen's Compensation law.

The case at bar is a right of action, or libel, for *wrongful* death and it has always been "the characteristic feature of the maritime law" to enforce state death statutes giving a remedy for wrongful death.

Southern Pacific Co. v. Jensen, 244 U. S. 205, did not grow out of *alleged wrongful death*, nor was a "right of action" given by state statute.

It had nothing to do with alleged wrongful death. No element of tort was involved therein. No item of wrong was alleged, tried or adjudicated. No

claim of any kind was made as for alleged wrongful death.

The above being true, there is no analogy between the *Jensen* case and the case at bar, and, therefore, the *Jensen* case is no authority or decision in the instant case, and there exists the same distinction as has always existed and has always been recognized between action in admiralty for personal injuries resulting in death and actions in admiralty not resulting in death.

The Jensen case and the N. Y. Compensation Law analyzed.

The *Jensen* case arose under the Workmen's Compensation law of the State of New York, *and not otherwise*. It seems necessary, therefore, in order to demonstrate the true meaning of the *Jensen* decision, to go to the very foundation of the New York statute.

This has already been done by the Supreme Court of the United States in *New York Central R. Co. v. White*, 243 U. S. 187; 61 L. Ed. 667.

In that case the constitutionality of the Workmens' Compensation Act of New York, upon which the liability in the *Jensen* case was later founded, was under review, and the court, speaking through Mr. Justice Pitney, thoroughly analyzes the Compensation Act of New York and sums it up, on page 674, as follows:

> "Briefly, the statute imposes liability upon the employer to make compensation for disability or death of the employee resulting from

> accidental personal injury arising out of and in the course of the employment, *without regard to fault as a cause,* except where the injury or death is occasioned by the employee's wilful intention to produce it, or where the injury results solely from his intoxication while on duty."

Southern Pacific v. Jensen followed the decision in the case of *New York Central v. White*, and this court simply affirmed in the *Jensen* case its previous holding in the *White* case, the court saying in the *White* case:

> "The scheme of the act is so wide a departure from common-law standards respecting the responsibility of employer to employee that doubts naturally have been raised respecting its constitutional validity."

That a right of action is not given by the New York act is made plain, where Mr. Justice Pitney says in the very first line of the decision that it is a "claim".

If the whole decision in the *White* case is read it will only strengthen the citations of the excerpts above given, and appellee's assertion that the *Jensen* case does not apply to the case at bar, will be fortified.

Liability under the New York statute to pay stated amounts for accidental death was fixed as an economic measure without regard to fault, negligence, wrong or tort.

The only suggestion in the New York statute of fault or wrong is in the exception covering wilful intention of the employee to bring about his death.

In the *Jensen* case that could mean nothing else than suicide of the man Jensen. No such suggestion was ever made in any tribunal before which the case came. Neither was it suggested that Jensen was intoxicated at the time of his death, which is the only other provision of the constitutional amendment which might import the idea of fault.

This much is certain, that the liability of the employer is fixed irrespective of fault.

Can anything be plainer than this: The Jensen case had nothing whatever to do with wrongful death, because it was based upon the Workmen's Compensation Law of the State of New York?

Is it not, therefore, plain that the Jensen decision has no application whatever in this suit or libel for wrongful death?

The whole decision by the Supreme Court of the United States in the *Jensen* case was that the New York statute did not provide a "right of action", a "suit" or a "remedy" known to the common law.

Here is the decision in the *Jensen* case:

> "Exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the Federal District Courts, 'saving to suitors in all cases the right of a common law remedy where the common law is competent to give it'. *The remedy which the compensation statute attempts to give is of a character wholly unknown to common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction.*"

Under this characterization, where is there given an "action" by the New York state statute? For it is said that the thing given is of a character wholly unknown to the common law. If it were a "suit" or "action" it would not be so far removed from the common law as to be such an utter stranger to it.

So the *Jensen* case only holds that the New York compensation statute does not provide a "suit" or "action" to cover a claim for compensation, which holding cannot apply in the case at bar; this is an action, a suit, in familiar form, to be adjudicated under familiar rules of law.

The *Jensen* case itself fully and wholly recognizes the proposition that there was in the case no suggestion of "alleged wrongful death".

Mr. Justice McReynolds states in the *Jensen* case:

> "Compensation is to be made without regard to fault as a cause of the injury, except where it is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or another, or results solely from his intoxication while on duty. *Compensation is not based on the rule of damages applied in negligence suits, but, in addition to providing for medical, surgical or other attendance or treatment and funeral expenses it is based solely on loss of earning power.* * * *
>
> "Under the construction adopted by the state courts no ship may be loaded or discharged without incurring a penalty unless her owners comply with the act which, in order to secure payment of *compensation for accidents,*

generally without regard to fault and based upon annual wages, provides (Sec. 50):"

The protest of the prevailing opinion in the *Jensen* case was against encroachment upon admiralty jurisdiction, not by the character and enforcement of liability for a tortious death, but upon the fixture of an obligation, unknown, in either substance or form, to the common law, and after all the reasoning of the opinion, the actual decision is found near the end of it in the quotation from the case first above set forth.

We, therefore, have in the New York constitutional amendment, in the New York statute and in the decision in the *White* and *Jensen* cases emphatic and express negatives of the position taken by the petitioner.

The *Jensen* case holds further: The general maritime law may be changed, modified or affected by state legislation, saying:

> **"That this may be done to some extent cannot be denied (citing instances) * * * and the right given to recover in death cases (citing cases). * * * See The City of Norwalk, 55 Fed. 98, 106."**

II.

A COURT OF ADMIRALTY WILL ENFORCE A STATE STATUTE OF LIMITATIONS, BY ANALOGY, BUT WHERE CIRCUMSTANCES ARE SUCH AS TO EXCUSE DELAY, THE ADMIRALTY RULE OF LACHES WILL BE APPLIED. THE ONLY EXCEPTION TO THIS RULE IS WHERE THE STATE STATUTE CONFERRING THE RIGHT OF ACTION FOR DEATH EXPRESSES A LIMITATION IN THE STATUTE ITSELF, EITHER FIXING THE TIME OR MAKING THE ASSERTION OF THE RIGHT WITHIN A FIXED TIME A CONDITION TO THE MAINTENANCE OF THE ACTION.

All the cases cited by the petitioner are cases falling within the exception. Section 1970 of the Civil Code of the State of California does not contain within itself any limitation of time within which rights under it shall be asserted, the statute of limitations of California being found in another code, the Code of Civil Procedure. The section of the Code of Civil Procedure was enacted in 1872 and the particular subdivision, 3, has never been amended since its enactment. Section 1970 of the Civil Code was amended in 1903 and again in 1907, and was amended in the particulars upon which the respondent libelant relies (Stats. 1903, p. 256; Stats. 1907, p. 119).

The construction of these statutes and the decision as to the rule of law applicable in their enforcement are not new.

In *Gregory et al. v. Southern Pacific Co.*, 157 Fed. 113, Judge WOLVERTON passed up upon the very question raised here and laid down the rule that an action based upon Sec. 377 of Civil Code of Procedure of California might be brought in Oregon

within the statutory time provided by the laws of Oregon, although the right of action was barred by the California statute of limitations (Sec. 340 C. C. P., sub. 3), holding that Sec. 1970, Civil Code of California, might be enforced without the necessity of enforcing Sec. 340, C. C. P. of California.

In many states substantive rights and the time in which such rights must be asserted are contained within the law giving the right of action, and in these cases it has been held that the requirement as to time of commencing the action is a part of the statute creating that right. This is not the case where the right of action is given by one law and there exists a general and separate statute of limitations for beginning various actions.

In *Theroux v. Northern Pac. R. Co.*, 64 Fed. 84, it was said:

> "It must be accepted, therefore, as the established doctrine, that where a statute confers a new right which by the terms of the act is enforceable by suit only within a given period, the period allowed for its enforcement is a constituent part of the liability intended to be created, and of the right intended to be conferred. The period prescribed for bringing suit in such cases is not like an ordinary statute of limitations which merely affects the remedy."

In *The Harrisburg*, 119 U. S. 96; 30 L. Ed. 362, Mr. Justice Waite, in construing a statute in which a right of action to sue for death was given "provided" suit be commenced within a limited period, said:

"The statute creates a new legal liability, with the right to sue for its enforcement, *provided* the suit is brought within 12 months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself, as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year, and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. * * * Time has been made the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statute and the limitations of the remedy are, therefore, to be treated as limitations of the right. *No question arises in this case as to the power of a court of admiralty to allow an equitable excuse for delay in suing, because no excuse of any kind has been shown.*" (Italics supplied.)

As outlined in the petition herein, the widow of Manuel Souza, soon after his death on August 5, 1916, brought proceedings before the Industrial Accident Commission of the State of California to recover compensation for the irreparable injury which she and her five children had suffered.

Within a short space of time she was given an award by the Commission, which award was contested by Western Fuel Company, and proceedings continued until August 6, 1917, when upon motion

by counsel of the Western Fuel Company before the Supreme Court of the State of California, the award theretofore made by the Industrial Accident Commission of the State of California was annulled on the ground of lack of jurisdiction of the Commission to make the award. This was done under the rule in the *Jensen* case, as the law then under construction was the California Compensation Statute.

In *Lincoln v. Cunard S. S. Co.*, 221 Fed. 622, it was held that where

> "within the time prescribed by state statutes an action at law to recover for personal injuries inflicted by a steamship was brought against the owner in a federal court in New York but from various causes not chargeable to the fault of plaintiff the cause was delayed for more than two years, when it was dismissed for want of jurisdiction without prejudice, and a new action in admiralty was commenced at once, the case was so far exceptional that libelant would not be charged with laches to defeat the suit."

In *Fill v. Cunard S. S. Co.*, 217 Fed. 84, it was held a suit against a steamship company for personal injury was not barred by laches where a prior action at law was dismissed for want of jurisdiction, and other causes beyond libelant's control also contributed to the delay.

Substitution of parties permissible.

Some claim is made in the brief of appellants herein that the statute of limitations should run

as to the administrator's appointment and commencement of suit. The substitution, as party plaintiff, of an administrator was not a change in the cause of action.

Missouri, Kansas & Texas R. R. Co. v. Wulf, 226 U. S. 570; 57 L. Ed. 355;

Reardon v. Balakala Cons. Cop. Co., 193 Fed. 189;

Cox v San Joaquin Light & Power Co., 33 Cal. App. 522.

In any event, under Sec. 352 C. C. P. (California), the rights of the five minor children of Souza would be protected, the running of the statute of limitations being stayed during their infancy.

In the case at bar there is disclosed the highest degree of good faith and diligence on the part of the respondent libelant in the prosecution of available remedies, and the courts of admiralty below, both the District Court and the Circuit Court of Appeals, found no difficulty whatever, at any time, in the course of this long litigation, in applying the admiralty rule of grace consistently with the uniform and long-established principles bearing upon this particular point. There being no laches, there being no staleness, there being good faith, there being diligence, and there being no limitation expressed in the state statute conferring the substantive right of recovery, the courts below did not hesitate to do the equity which the whole situation invoked.

It is therefore earnestly and respectfully urged that the writ be denied; that the questions certified be answered as follows:

Number 1. In the affirmative,

Number 2. In the affirmative, and

Number 3. In the negative, and

that the court does not give its attention to the question of the statute of limitations, but, should it see fit to do so, that it affirm the views expressed by both courts below.

Dated, San Francisco,
March 10, 1920.

Respectfully submitted,

CHRISTOPHER M. BRADLEY,
Proctor for Respondent.

HENRY HEIDELBERG,
Of Counsel.

WESTERN FUEL COMPANY *v.* GARCIA, ADMINISTRATOR OF SOUZA.

CERTIFICATE FROM AND CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 28. Argued March 18, 1921; restored to docket for reargument and writ of certiorari ordered to issue to bring up entire record and cause, March 21, 1921; reargued October 7, 10, 1921.—Decided December 5, 1921.

1. No suit to recover damages for the death of a human being caused by negligence may be maintained in the admiralty courts of the United States under the general maritime law. P. 240.
2. But where death upon navigable waters follows from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel *in personam*, for the damages sustained by those to whom such right is given. P. 242.
3. The state statutes of limitation are applicable to such proceedings in the federal courts. So *held*, in a case where the injury and death occurred within the State where the libel was brought and whose statutes, creating the cause of action and providing a limitation, were applied. P. 242.

Judgment of District Court reversed.

CERTIORARI to review a case pending in the Circuit Court of Appeals on appeal from the District Court in admiralty.

Mr. Joseph F. Murray, with whom *Mr. Robert M. McCormick* was on the briefs, for petitioner.

This action is barred by the California statute of limitations. *The Harrisburg*, 119 U. S. 199. In that case the

liability and the remedy in Pennsylvania were created by the Act of 1851 and the limitation was created by the Act of 1855. The liability and the remedy in this case are found in the same statutes, § 377, Code of Civil Procedure, and § 1970, Civil Code, and the limitation here is found in § 340, Code of Civil Procedure. Therefore, it would seem to follow that the limitation in this case is not only of the remedy but of the right. *Davis* v. *Mills*, 194 U. S. 451.

The respondent is not relieved of the bar of the statute of limitations by § 355, Code of Civil Procedure, *Fay* v. *Costa*, 2 Cal. App. 241, as there was no appeal, but the award in favor of Mrs. Souza was annulled by writ of review, the only remedy available to the Western Fuel Company in the state courts. There is an entire failure to excuse the commencement of the action by the proper party, viz, the administrator. In *Union Fish Co.* v. *Erickson*, 248 U. S. 308, the right of action did not depend upon any state law; there was a maritime contract, and a right of action given by admiralty itself.

State statutes fixing the liabilities of parties in tort actions will not be applied in admiralty. Const., Art. III, § 2. Congress purposely excluded trials in admiralty from the operation of § 34 of the Judiciary Act of 1789 (Rev. Stats., § 721) so that the rights of litigants in courts of admiralty should be uniform and equal and not subject to the varying whims and ideas of the legislators of the different States; so that a claimant's right to relief might not be limited by restrictive laws of any state legislature and so that the respondent might not be deprived of his recognized defenses.

In the same Judiciary Act, in what are now §§ 913 and 914 of the Revised Statutes, Congress expressly provided that not even the practice, forms or proceedings in admiralty should be the same as those in state courts. By these several statutes Congress showed unmistakably that

courts of admiralty were to be independent of all state laws and decisions. Cf. *American Steamboat Co.* v. *Chase*, 16 Wall. 522, 534; *Bucher* v. *Cheshire R. R. Co.*, 125 U. S. 555; *Detroit* v. *Osborne*, 135 U. S. 499; *McClaine* v. *Rankin*, 197 U. S. 154. We have been unable to find any case where § 721 has been construed or any effect given it in an action in admiralty. Distinguishing: *Trauffler* v. *Detroit & Cleveland Navigation Co.*, 181 Fed. 256, 261; *Cornell Steamboat Co.* v. *Fallon*, 179 Fed. 293; *Quinette* v. *Bisso*, 136 Fed. 825; *The Alaska*, 130 U. S. 201; and *The Corsair*, 145 U. S. 335.

The statutes of California under consideration here take away from an employer the defenses of assumption of risk, negligence of a fellow servant and contributory negligence. These statutes are not mere rules of evidence. They affect the rights and liabilities of the parties. *New Orleans & Northeastern R. R. Co.* v. *Harris*, 247 U. S. 367; *Yazoo & Mississippi Valley R. R. Co.* v. *Mullins*, 249 U. S. 531. If a state legislature, in actions by employees against employers brought in a court of admiralty, may take away the employer's defenses, then it can go one step further and make the employer responsible for all injuries regardless of negligence. This would be going far beyond what was contended for in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205. If the New Jersey compensation law is not applicable to maritime torts, and there is no question but that it is not applicable (*Coon* v. *Kennedy*, 248 U. S. 457; 91 N. J. L. 598), how can it seriously be contended that the California Act, which is in effect a compensation law, is enforceable in a court of admiralty?

This court has held in numerous cases in which actions were brought under the Federal Employers' Liability Act that state statutes would have no application, although the suits were brought in state courts, because Congress had legislated. On the other hand, over maritime matters the States had never exercised any jurisdic-

tion, because jurisdiction had been from the beginning reserved to Congress. The distinction was recognized in *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149. And even though Congress, in enacting § 34 of the Judiciary Act, had not shown conclusively that state statutes could not affect proceedings in admiralty, still its failure to legislate could not be construed as permission for the States to make their legislation binding in admiralty. *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372; *Schuede* v. *Zenith S. S. Co.*, 244 U. S. 646; *Workman* v. *New York City*, 179 U. S. 552.

It has always been recognized that material differences in the liabilities of the parties may depend upon the forum, and that, whereas such liabilities at common law might change with the several States, they would remain the same in admiralty. *Steamboat New York* v. *Rea*, 18 How. 223; *Atlee* v. *Packet Co.*, 21 Wall. 389; *The Eagle* v. *Fraser*, 8 Wall. 15; *Smith* v. *Conary*, 1 How. 28; *Watts* v. *Camors*, 115 U. S. 353. Even the dissenting members of this court in the recent cases recognized the rule.

A court of admiralty will recognize state statutes permitting a recovery for death, but will enforce them in accordance with the well-recognized principles of maritime law. Under the Judiciary Act a person injured by reason of a maritime tort has the election of proceeding in admiralty or proceeding at common law. If he proceeds in a court of common law he acquires the benefits and assumes the obligations of the common law. If he proceeds in admiralty, he acquires the benefits and assumes the obligations of admiralty. It was open to the plaintiff in this case to proceed in the state courts of California and there avail himself of the California statutes, but he chose the court of admiralty.

The argument that because in this case admiralty is enforcing a right given by a state statute the liabilities of the parties are fixed by the state statutes, is satisfactorily answered in *The J. E. Rumbell*, 148 U. S. 1. Since Souza met his death by reason of the negligence of a fellow servant, no recovery can be had.

Mr. Henry Heidelberg, with whom *Mr. Christopher M. Bradley* was on the briefs, for respondent.

A suit by libel for damages for wrongful death can be maintained only because of the existence of a state statute and the recovery should be in accordance with the substantive law laid down in that statute.

Section 1970 of the Civil Code, and its modifications of the fellow-servant law, violates no "characteristic" features of admiralty law, for the reason that it is in relation to recovery for wrongful death, and there was no common law or admiralty law upon that subject.

The rule of laches should be applied as the law of limitations of actions in this case, for the reason that admiralty has as one of its "characteristics" the law of laches, which is the law of that forum.

The right given under § 1970 has no limitations attached to it as to the length of time in which suit must be brought. The limitation of actions for the State is found in a distinct enactment, § 337, Code of Civil Procedure, which provides for a limitation of one year.

The question thus involved has been passed upon in *Gregory* v. *Southern Pacific Co.*, 157 Fed. 113, in which a suit for wrongful death, based upon an injury happening in California and upon the sections of the California law authorizing such recovery, was maintained in Oregon within two years, notwithstanding the fact that the law of limitation of action for recovery in that case in California was one year. And see *Theroux* v. *Northern Pacific R. R. Co.*, 64 Fed. 84. It will be contended by our opponents

that the California statute of limitations should apply, and cases may be cited in which such statutes of limitation have been applied, but in those cases the law placed a limitation upon the right of recovery by making the statute read "provided" suit is brought within a certain length of time, and the limitation of time for suit will be found within the statute giving the right of suit.

No such limitation is contained in § 1970, Civil Code of California, and time is not made the essence of the right to sue. Courts of admiralty recognize the rule of laches in suits of this kind. *The Harrisburg*, 119 U. S. 199.

Ample excuse for delay was shown in this case.

Limitation of actions is a law of the forum and the law of the forum governs when there is a conflict as to limitations of actions. *O'Sullivan* v. *Felix*, 233 U. S. 318; *Gregory* v. *Southern Pacific Co.*, 157 Fed. 113.

A writ of review, such as was the procedure for reviewing the award of the California Industrial Accident Commission, is not an appeal and hence no subsequent action could have been maintained in the state court pursuant to § 335, California Code Civil Procedure, *Fay* v. *Costa*, 2 Cal. App. 241.

Courts of admiralty are not bound by state statutes in determining the question of laches; they govern themselves by the analogies only, in the absence of special or exceptional circumstances.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The Circuit Court of Appeals certified certain questions for instruction and thereafter we directed that the cause be sent here for determination as if upon appeal. Judicial Code, § 239.

Manuel Souza, a citizen and resident of California, was instantly killed, August 5, 1916, while employed as a stevedore by the petitioner and at work in the hold of the

"Tancred," a Norwegian vessel under charter to it, then anchored in San Francisco Bay and discharging her cargo. The libel alleged that the injury was caused by coal negligently permitted to fall from a steel hoisting bucket.

Relying upon the California Workmen's Compensation Act of 1913, the Industrial Accident Commission granted an award in favor of the widow and children which the Supreme Court of the State annulled August 6, 1917—a year and a day subsequent to the death.

Shortly thereafter—August 21st—the widow and children began an admiralty suit *in personam* against the petitioner in the United States District Court, Northern District of California, wherein they alleged that the accident resulted from its negligence and prayed for damages. Later, respondent, having been appointed administrator, filed an amended libel with like allegations and prayer; and upon this the cause was ultimately tried. Petitioner denied liability and relied upon § 340, sub-section 3, California Code of Civil Procedure, which requires that an action for damages consequent upon death caused by wrongful act, or negligence shall be brought within one year.[1]

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[1] CALIFORNIA CODE OF CIVIL PROCEDURE.

TITLE II. TIME OF COMMENCING CIVIL ACTIONS.

Chapter I. TIME OF COMMENCING ACTIONS IN GENERAL.

Section 312. **Commencement of civil actions.** Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute.

Chapter III. TIME OF COMMENCING ACTIONS OTHER THAN FOR RECOVERY OF REAL PROPERTY.

Section 335. **Periods of limitation prescribed.** The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows: . . .

Section 340. **Within one year.** . . .

3. An action for libel, slander, assault, battery, false imprisonment, seduction or for injury to or for the death of one caused by the wrongful act or neglect of another or by a depositor against a bank for the payment of a forged or raised check.

The District Court held in favor of the administrator and awarded substantial damages; the Circuit Court of Appeals has sent up the whole cause under our direction.

It is established doctrine that no suit to recover damages for the death of a human being caused by negligence, may be maintained in the admiralty courts of the United States under the general maritime law. At the common law no civil action lies for an injury resulting from death. The maritime law as generally accepted by maritime nations leaves the matter untouched and in practice each of them has applied the same rule for the sea which it maintains on land. *The Harrisburg*, 119 U. S. 204, 213; *The Alaska*, 130 U. S. 201, 209; *La Bourgogne*, 210 U. S. 95, 138, 139.

How far this rule of non-liability adopted and enforced by our admiralty courts in the absence of an applicable statute may be modified, changed or supplemented by state legislation has been the subject of consideration here but no complete solution of the question has been announced.

In *Cooley* v. *Board of Wardens*, 12 How. 299, and *Ex Parte McNiel*, 13 Wall. 236, the power of a state to legislate concerning subjects maritime in their nature was under discussion; and it was pointed out that as to certain local matters a state statute may grant rights which will be enforced in an admiralty court.

In *American Steamboat Co.* v. *Chase*, 16 Wall. 531, 532, the decedent was killed on navigable waters within Rhode Island. Relying upon the death statute of that State, his administrator sued and recovered in one of its courts. This court affirmed the judgment. Whether an admiralty court could have entertained a proceeding based upon the statute was mooted but not determined.

Sherlock v. *Alling*, 93 U. S. 99, arose out of a collision between steamboats on the Ohio River within the limits

of Indiana, whose statute gave a right of action for death caused by wrongful act, and a recovery in the state court was affirmed here. The defense rested primarily upon the erroneous theory that the statute encroached upon the commercial powers of Congress. There was no discussion of the point now directly presented. In *Butler* v. *Boston & Savannah S. S. Co.*, 130 U. S. 557, 558, the point was raised but left without expression of opinion.

The Hamilton, 207 U. S. 398, 405, an admiralty proceeding for limitation of liability, affirmed the validity of claims for damages resulting from death at sea based upon the statute of Delaware where the vessel's owner had been incorporated.

The inferior federal courts on the admiralty side have enforced rights of action based upon death statutes holding they had jurisdiction as the claims grew out of torts on navigable waters and were maritime in their nature. *The City of Norwalk*, 55 Fed. 98, and the cases cited. See also Hughes on Admiralty, 2nd ed., pp. 228, 230, *et seq.*

In *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205; *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372; *Union Fish Co.* v. *Erickson*, 248 U. S. 308, and *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, we have recently discussed the theory under which the general maritime law became a part of our national law, and pointed out the inability of the States to change its general features so as to defeat uniformity—but the power of a State to make some modifications or supplements was affirmed. And we further held that rights and liabilities in respect of torts upon the sea ordinarily depend upon the rules accepted and applied in admiralty courts which are controlling wherever suit may be instituted. Under this view, *American Steamboat Co.* v. *Chase*, and *Sherlock* v. *Alling*, support the right to recover under a local statute in an admiralty court for

death occurring on navigable waters within the State when caused by tort there committed.

As the logical result of prior decisions we think it follows that, where death upon such waters results from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel *in personam* for the damages sustained by those to whom such right is given. The subject is maritime and local in character and the specified modification of or supplement to the rule applied in admiralty courts, when following the common law, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations. *Southern Pacific Co.* v. *Jensen, supra.*

The California Code of Civil Procedure, § 340, prescribes one year as the period within which an action for death caused by wrongful action or negligence shall be brought. It is admitted that under the circumstances here presented suit against petitioner, if instituted in a court of that State, would have been barred, and we are of opinion that the same limitation must be enforced in respect of the admiralty proceeding. It was so decided in *The Harrisburg,* 119 U. S. 213, 214, a proceeding *in rem* begun in the United States District Court, Eastern District of Pennsylvania. The steamer belonged to the Port of Philadelphia, where she was duly enrolled, and the accident occurred upon navigable waters within Massachusetts. The Pennsylvania statute permitted suit for damages resulting from death and provided that "the action shall be brought within one year after the death, and not thereafter." The Massachusetts statute provided that, in case of death resulting from the wrongful action of a corporation, the executor might recover by indictment a fine not exceeding $5,000.00, and further, that indictments

against a corporation for loss of life shall be prosecuted within one year from the injury causing the death. Through Mr. Chief Justice Waite, this court said:

"The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year, and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right." See also *Davis* v. *Mills*, 194 U. S. 451, 453.

"An Act Relating to the maintenance of actions for death on the high seas and other navigable waters," approved March 30, 1920, c. 111, 41 Stat. 537, gives a right of action for damages resulting from death caused by wrongful act, neglect or default occurring on the high seas beyond one marine league from the shore. It expressly directs, "That the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Act. Nor shall this Act apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone."

In the present cause the District Court rightly assumed jurisdiction of the proceedings, but erred in holding the

right of action was not barred under the state statute of limitation. Accordingly, its judgment must be reversed and the cause remanded there with instructions to dismiss the libel.

Reversed.